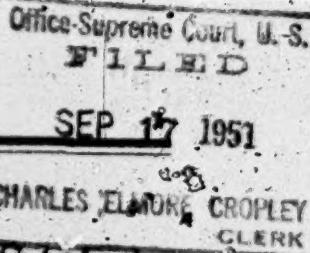


No.

6

AND

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951

No. 6

CHARLES F. BRANNAN, Secretary of Agriculture of the  
United States, Petitioner,

v.

DELBERT O. STARK, A. F. STRATTON, A. R. DENTON,  
G. STEBBINS, and F. WALSH, Respondents.

No. 7

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.,  
Petitioner,

v.

DELBERT O. STARK, A. F. STRATTON, A. R. DENTON,  
G. STEBBINS, and F. WALSH, Respondents.

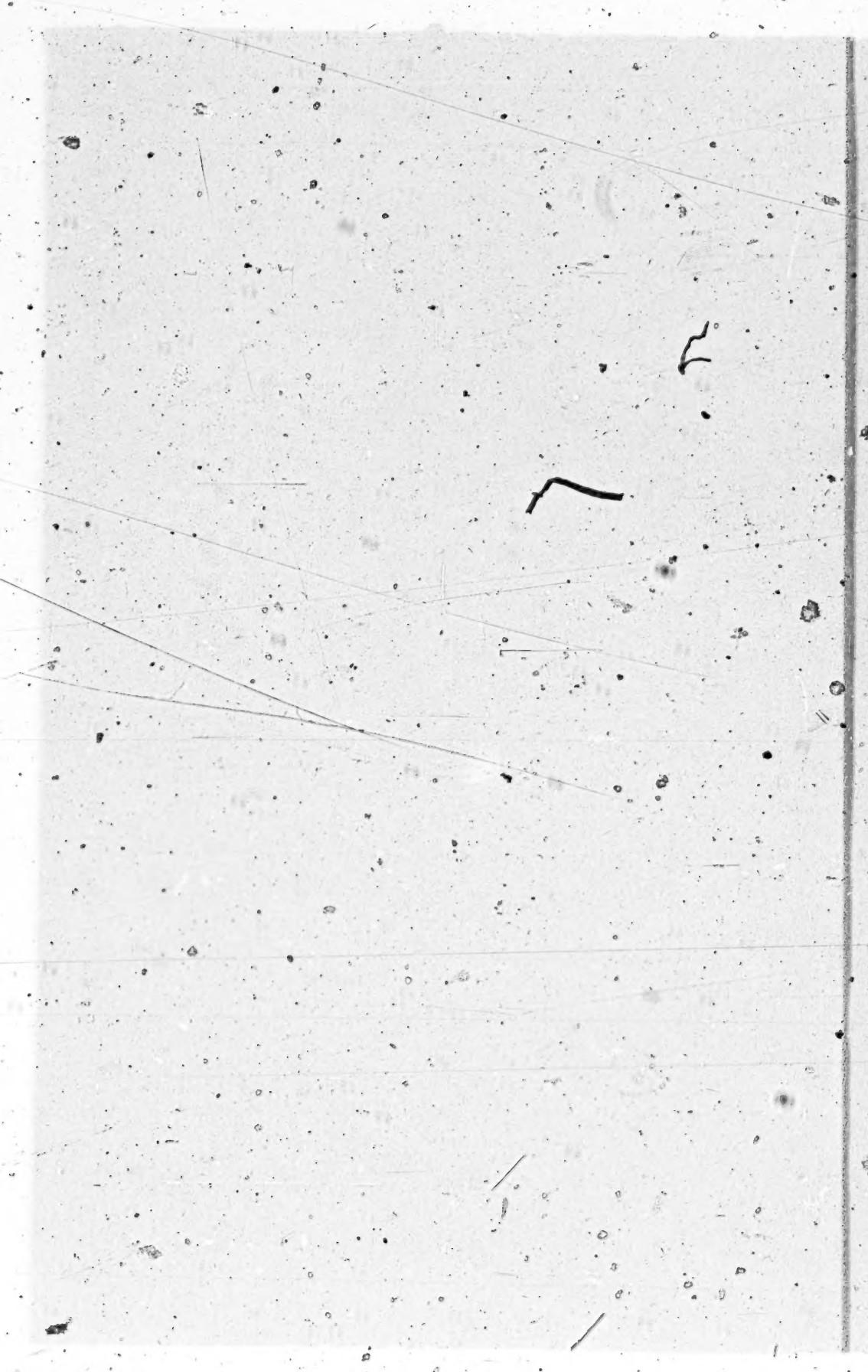
*On Writs of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit.*

## BRIEF FOR THE DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.

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*On Writs of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit.*

## BRIEF FOR THE DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.

### PRIOR OPINIONS.

Prior opinions in this case have been reported as follows:

- a. United States Court of Appeals for the District of Columbia Circuit, 136 F. (2d) 786, decided June 14, 1943.
- b. Supreme Court of the United States, 321 U. S. 285, decided February 28, 1944.
- c. United States District Court for the District of Columbia, 82 F. Supp. 614, decided February 24, 1949 (R. 142)

d. United States Court of Appeals for the District of Columbia Circuit, 185 F. (2d) 871, decided November 9, 1950 (R. 470).

### **JURISDICTION.**

The judgment to be reviewed was entered by the United States Court of Appeals for the District of Columbia Circuit November 9, 1950 (R. 488). Petitions for writ of certiorari were filed February 6, 1951, and granted April 16, 1951. The jurisdiction of this Court is invoked under United States Code, Title 28, Section 1254.

### **QUESTIONS PRESENTED.**

This case involves the validity of the so-called "co-operative payment" provisions of the Greater Boston Marketing Area Milk Order, issued by the Secretary of Agriculture.<sup>1</sup> These provisions tend to equalize the cost of the marketing control and research services that are furnished by cooperatives for the benefit of all producers and that are necessary to the establishment and maintenance of orderly marketing conditions for milk. This equalization is provided by payments from the producer settlement fund that partially compensate the cooperatives for such services. The questions presented are—

1. Whether the Secretary of Agriculture has statutory authority, upon substantial evidence and findings, to include the cooperative payment provisions in the Order.
2. Whether, on the basis of evidence (R. 253-466) made of record since the decision of this Court in *Stark v. Wickard*, 321 U. S. 288, this action should be dismissed on the ground that it is not a proper class action, that the surviving plaintiffs are not the real parties in interest, and

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<sup>1</sup> 7 C.F.R. 1949 ed., §§904.10(a)-(d) and 904.8(b)(5). The corresponding sections of the Order as in force in 1941 when this action was instituted, were §§904.9(a)-(d) and 904.7(b)(5) (R. 6-7 and 132-4).

that they have by their conduct estopped themselves from maintaining this action.

### **STATUTES AND ORDER INVOLVED.**

*The Act.* The statute primarily involved is the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31) as amended August 24, 1935 (49 Stat. 750), and particularly sections 1, 2, 8c and 10(b) thereof. The Act directs the Secretary (a) to issue a milk order if he finds it will tend to effectuate the declared policy of establishing and maintaining such orderly marketing conditions as will establish parity prices for farmers (§§8c and 2), and (b) in issuing such orders, to accord to producer-owner and producer-controlled cooperatives such recognition as will tend to promote efficient methods of marketing and distributing (§10(b)(1)).

Section 1 of the Agricultural Marketing Agreement Act of June 3, 1937, "affirmed and validated" and "reenacted without change"<sup>1</sup> various provisions of the 1933 Act (50 Stat. 246). In section 4 thereof it also "ratified, legalized and confirmed" all milk licenses and orders issued under the 1933 Act or any amendment thereof. The Agricultural Act of July 3, 1948 (62 Stat. 1258) amended section 4 of the 1937 Act and provided that "any program in effect" on January 1, 1950 under the 1933 Act as amended and reenacted by the 1937 Act, "shall continue in effect without the necessity for any amendatory action relative to such program."

The 1933 Act, as amended in 1935 and reenacted in 1937, including subsequent amendments thereto, is referred to in this brief as the "Act".

The Act may be found in 7 U.S.C., ch. 26. The pertinent portions thereof, together with section 1 and section 4, as amended, of the 1937 Act, are set forth in Part I of the Appendix to this brief.

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<sup>1</sup> The statute adds "except as provided in section 2", but that section made no changes relevant here.

*The Order.* The Greater Boston Marketing Area Milk Order was originally issued under the Act by the Secretary on February 7, 1937, and at that time designated as Order No. 4. It is referred to in this brief as "Order 4" or the "Boston Milk Order".

On July 29, 1941, the Boston Milk Order was amended, effective August 1, 1941 to provide for cooperative payments (6 F.R. 3762; 7 C.F.R., 1941 supp., §904.9(a)-(d) and §904.7(b)(5)). In 1944 the cooperative payment provisions were retained without modification by the War Food Administration with the approval of the Director of Economic Stabilization (9 F.R. 3059; 9 F.R. 4972). On July 21, 1947, the Secretary amended the cooperative payment provisions and placed them in effect in their present form on August 1, 1947 (12 F.R. 4921; 7 C.F.R., 1949 ed., §§904.10 and 904.8(b)(5)).

The Boston Milk Order, as presently in effect, may be found in 7 C.F.R., 1949 ed., §§904.1-904.110. The pertinent provisions of the Order, as they appear in the Code of Federal Regulations, are set forth in Part II of the Appendix to this brief.

### STATEMENT OF THE CASE.

*The Proceedings.* Respondents brought this action September 22, 1941 to enjoin the Secretary of Agriculture from making cooperative payments under the Boston Milk Order on the ground that the provisions in the Order for such payments were beyond the authority conferred on the Secretary by the Act (R. 1-7). Previously, on July 29, 1941 the Secretary had amended the Boston Milk Order to provide for cooperative payments. The amendments had been adopted in conformity with notice, hearing, findings, referendum, and other procedural requirements of the Act (6 F.R. 3762). In 1947 the cooperative payment provisions were amended by the Secretary in accordance with such requirements (12 F.R. 4921).

In *Stark v. Wickard*, 321 U. S. 288, decided in February, 1944, this Court, reversing the court below, held that respondents have personal claims justifying judicial consideration and the legal standing to object to the legality of the cooperative payment provisions of the Boston Milk Order. This Court did not decide the question of the statutory validity of those provisions.

Later that year the War Food Administration, with the approval of the Director of Economic Stabilization, determined following extensive public hearings to retain the cooperative payment provisions (9 F.R. 3059, 4972). In 1947 the Secretary of Agriculture issued amendments to the cooperative payment provisions.

On remand the United States District Court for the District of Columbia held the cooperative payment provisions illegal (R. 142<sup>9</sup>) and enjoined the Secretary from making such payments (R. 154-5). The judgment was stayed *pendente lite* on condition the payments be held in escrow (R. 156-7). The United States Court of Appeals for the District of Columbia Circuit affirmed, Judge Edgerton dissenting (R. 470).

Petitioner, the Dairymen's League Cooperative Association, Inc., is a cooperative association qualified to receive cooperative payments under the New York Metropolitan Marketing Area Milk Order (7 C.F.R., 1949 ed., §927.9(f)). The League intervened as a party defendant before the District Court (R. 51-2) and appealed the judgment of that court (R. 157-8). Its petition for certiorari to review the judgment of the Court of Appeals was granted by this Court.

*The Cooperative Payment Provisions*.—The Boston Milk Order, as presently in force, provides<sup>1</sup> for payments by the Secretary to qualified cooperatives as follows:

<sup>1</sup> 7 C.F.R., 1949 ed., §904.10(b). The present rates were established by amendments to Order 4 issued July 21, 1947, effective August 1, 1947 (12 F.R. 4921).

The rates in effect at the time this action was instituted (7 C.F.R., 1941 Supp., §904.9(a)) were respectively as follows: 5¢/cwt. on

1. An "operating" cooperative (one that operates plants of its own) is paid 2¢/cwt. on milk received at its plants whether from a member or a non-member of the cooperative.
2. A "bargaining" cooperative (one that has no plants) is paid 1¢/cwt. on milk of members of the cooperative delivered to a plant operated by a proprietary handler.

The cooperative payments are made from the "producer settlement fund". This is the designation given moneys received by the market administrator from handlers during the equalization or pooling processes under which producers receive a uniform blended price (subject to butterfat, location, and other differentials) for their milk, regardless of the use made of the particular milk of a particular producer (7 C.F.R., 1949 ed., §§904.10(b) and 904.9(b)(2)). The producer settlement fund operations are described in *United States v. Rock Royal Co-operative*, 307 U. S. 533, 571.

In computing the amount of cooperative payments there is excluded the milk of producers who, like respondents, are not members of a cooperative<sup>1</sup> and do not deliver their milk to the plant of a cooperative. By such exclusion the aggregate amount of cooperative payments to be made from the producer settlement fund is reduced *pro tanto*.

Since the cooperative payments are made from the producer settlement fund, they are consequently borne *pro rata* by *all* producers, cooperative or non-cooperative,—both those whose milk is included, and those whose milk

Class I milk received at the cooperative's plant (except milk sold to stores, or to handlers owned in whole or part by the cooperative, or to handlers with whom the cooperative has an arrangement that milk not sold to that handler is unavailable as Class I milk to any other handler); and 1½¢/cwt. on members' milk marketed by the cooperative on their behalf. These rates were established by amendments issued July 28, 1941, effective August 1, 1941 (6 F.R. 3762).

<sup>1</sup> Respondent Stebbins in 1943, subsequent to the institution of this action, joined a cooperative that receives cooperative payments (R. 281-2).

is excluded, in computing the payments. The complaint alleges (R. 1, 6) that the uniform blended price for milk is unlawfully reduced by reason of the deduction of the co-operative payments from the producer settlement fund.

The payments are made to a cooperative as compensation for marketing control and research services of a general marketwide character furnished by the cooperatives for the benefit of all producers, cooperative and non-cooperative alike (9 F.R. 3059).

*Facts Relating to Preliminary Questions.*—In *Stark v. Wickard*, 321 U. S. 288, this Court did not decide whether the action was a proper class action, whether respondents were the real parties in interest, or whether they had estopped themselves from maintaining the action. There are set forth at this point the facts relating to these preliminary questions. Most of these facts did not become of record until depositions were taken in 1948 (R. 254-466) subsequent to the decision in the *Stark* case.

It is alleged that respondents (plaintiffs below) are five milk producers under the Boston Milk Order (R. 2). They are not members of cooperatives except one, Stebbins, who, subsequent to the institution of this action, changed his mind and joined a cooperative (R. 181-2). Respondent Stratton is dead (R. 306, 322, 350). The milk from the dairy of respondent Stark was not shipped under the Boston Milk Order in his name, but in the name of D. Q. & M. J. Stark (R. 361-2). Respondent Walsh at the time of the taking of his deposition in 1948 was no longer delivering milk under the Boston Milk Order, but to a dealer in Glen Falls, N. Y. (R. 255). The milk purported to be delivered under the Boston Milk Order by respondent Denton, was carried in the name of his wife, from 1941 to 1945 and payments under the Order were made to her (R. 299).

At the referendum held pursuant to section 8c(19) of the Act on adoption of the 1941 amendments to the Boston Milk Order, 11,438 producers voted for the amended Order, 61 against, with 88 ballots disqualified. The 61 op-

ponents were all producers who were not members of a cooperative. On the other hand, 694 such independent producers voted for the amended Order (R. 91).

Respondent Walsh was unable to say whether he voted in the 1941 referendum, but he did vote in favor of the Order in 1942 (R. 257). Respondent Stebbins was uncertain as to his votes but admitted to voting for the Order in 1944, 1946, and 1947 through the cooperative which he had meanwhile joined (R. 292). Respondent Denton was also uncertain (R. 317). Respondent Stark admitted that if the Referendum Office records showed that he voted for the Order with the amendments in 1941, it was true (R. 353).

The plaintiffs alleged that they brought the action both "for themselves and for the benefit of all other persons similarly situated" (R. 2).

The H. P. Hood Company and the Whiting Company, the principal proprietary handlers in the Greater Boston Marketing Area, opposed the issuance of Order 4 in 1937, but failed in their attempt to have it held invalid by this Court.

*H. R. Hood & Sons v. United States*, 307 U. S. 588. Further in 1939 this Court said that such handlers had no standing to complain regarding the operations of the producer settlement fund (*United States v. Rock Royal Co-Operative*, 307 U. S. 533, 560-1, 571-2);—a conclusion later reaffirmed in *Stark v. Wickard*, 321 U. S. 288, 308. In the hearings preceding the 1941 amendments the Hood and Whiting companies opposed provisions for cooperative payments (R. 369-70, 372). They both asked for elimination of such payments from the Order in 1946 and made an extensive presentation at that time (R. 371-2, 408, 428).

The Whiting Company producers through delegates had customarily conferred with the company as to prices beginning with the suspension of the Boston Milk Order in 1937 (R. 331). In 1941 they conferred with Larsen, the president of the Whiting company, and Cooley, its country representative, and asked their advice (R. 331, 363-67).

The country representative told the producers that the company was opposed to the cooperative payments, "and why" (R. 372). Stark and others decided to bring an action (R. 304, 366) and conferred with Larsen who recommended Polikoff to act as their attorney (R. 337, 366). Larsen also introduced Polikoff to them in a Boston hotel room (R. 338). There was no understanding with the attorney as to fees or costs (R. 261, 339-40).

At the producers' meeting the Whiting company representatives were asked by plaintiffs Stratton and Stark as to the position of the company. The reply was that the company would give assistance but could not initiate any move (R. 366, 370).

Walsh and Stratton as Hood producers were then interested in the case,—Walsh at a conference of some producers and a field representative of Hood who brought them there and introduced the producers (R. 259-61, 265), and Stebbins by a letter from Stark (R. 278-9). "It could have been" that contact with the Hood producers was suggested by Polikoff (R. 358).

Polikoff went into the Army and Stark, after conferring with many people, including Cooley and some handlers (R. 347), retained Mr. Hanify, who is a member of the firm of attorneys that represents the Hood company (R. 400, 433, 447-8).

Some Whiting producers signed an authorization for that company to deduct 1¢ per cwt. from their milk payments to cover the expenses of the suit (R. 308). The deductions continued for two or three months and aggregated between \$400 and \$500 (R. 368). This money is still held unexpended by the Whiting company and no bills for expenses have been rendered to the producers (R. 308-9, 348). However, the Hood company paid bills of Polikoff for services and disbursements amounting to \$5,112.55 and of the Hood attorneys for services and disbursements up to February 2, 1948, amounting to \$17,751.74. The Hood company was reimbursed for one-half by other dealers (R. 450).

Merrill of the Hood company stated that his company was vitally interested in the case, would like to see it won, and was financing the case (R. 443, 445, 406). Cooley of the Whiting company conferred with manager Geyer of the Hood company regarding the case (R. 369) and said his company expected to pay part of the expense (R. 368).

### **SPECIFICATION OF ERRORS TO BE URGED.**

The United States Court of Appeals for the District of Columbia Circuit erred—

1. In holding that there is no statutory basis for the provisions in the Boston Milk Order for payment to cooperatives, out of the producer settlement fund, for the performance of services that have been found by the Secretary to be necessary in order to make effective the classification, pricing, and pooling provisions of the Order and that are beneficial to all producers, both members and non-members of cooperatives.
2. In holding that as a matter of law the provisions in the Boston Milk Order for payments to cooperative associations for the performance of marketwide services (a) are "inconsistent" with the statutory provisions in section 8c(5) of the Act providing for uniform prices for milk, (b) are not "necessary" to effectuate the other provisions of the Order or the policy of the Act, and (c) are not "incidental" to the classification, pricing, and pooling provisions of the Order.
3. In holding that the delegation of power to the Secretary of Agriculture to issue milk orders is so limited that provisions of the Boston Milk Order are not "necessary" as a matter of law, even though (a) such provisions are included by the Secretary on the basis of evidence introduced at public hearings and upon findings by him that the provisions are "necessary" to effectuate the other provisions of the Order and the declared policy of the Act, (b) such findings are based on substantial evidence,

and (c) such provisions were conceded by the court to be helpful and pronounced aids to all participants in the program since 1941.

4. In construing the Boston Milk Order (notwithstanding its specific terms and the interpretation thereof in *Stark v. Wickard*, 321 U. S. 288, 301, 305), as requiring payments to producer members of the cooperative associations instead of directly to such associations, and as a result of such construction claiming lack of uniformity in the prices paid producers.

5. In not holding that the cooperative payment provisions of the Boston Milk Order accord such recognition to producer-owned and producer-controlled cooperative associations as will tend to promote efficient methods of marketing and distribution, in conformity with the mandate imposed on the Secretary of Agriculture by section 10(b)(1) of the Act.

6. In failing to dismiss the action as a class action on the ground that respondents have interests different from many of the producers involved and do not adequately represent any class of producers.

7. In failing to dismiss the action as an individual action on the ground (a) that the respondents are not the real parties in interest since the action was instigated and is wholly, or almost wholly, financed and controlled by handlers who under *Stark v. Wickard*, 321 U. S. 288, 308 and *United States v. Rock Royal Co-operative*, 307 U. S. 533, 560-1, 571-2, have no standing to complain of the validity of the co-operative payment provisions, and (b) that respondents are not, or have ceased to be, producers making deliveries under Order 4 and have estopped themselves from maintaining this action.

## SUMMARY OF ARGUMENT.

The policy declared by Congress in the Agricultural Adjustment Act of 1933, as amended and reenacted, is the establishment and maintenance of orderly marketing conditions for milk (as well as certain other commodities) in order to attain parity prices for farmers (Act, §2). This policy is both vital and difficult to carry into effect. It embodies an objective and purpose that concern matters of "national public interest" (Act, §1). The provisions of the Act empowering the Secretary to effectuate this policy are to be construed with reference to such policy.

The Secretary has found that the inclusion in the Boston Milk Order of cooperative payment provisions is necessary to effectuate the other provisions of the Order and is incidental to, and not inconsistent with, such provisions. His construction of the Act as permitting him to provide for cooperative payments is fortified by such findings, and the factual basis for the findings is not in dispute.

The basic terms and conditions for a milk marketing order, as specified in the Act, namely, classification of milk according to its uses, minimum prices for milk, and equalization or pooling would not alone result in an adequate Boston milk marketing order. In many markets other order provisions are necessary to assure certain general, market-wide services, such as affording an outlet for surplus milk to prevent its dumping, furnishing reserve supplies to meet irregular needs of handlers, marketing milk in such manner as to keep the uniform blended price to producers at the highest practicable level, maintaining competent staffs of marketing experts to advise on marketing operations, present evidence at amendment hearings, be informed on milk prices, and afford producer leadership in the market. The cooperatives render these services at large cost to themselves. General, marketwide services of this character are to be distinguished from individual services for the benefit of a particular producer, such as verification of weights of his milk or sampling or testing it.

The co-operative payment provisions in the Boston Milk Order afford partial compensation for the general, market-wide services and spread the burden of the cost equitably among all the producers benefited, both members and non-members of the cooperative association.

Cooperative payments are made to a cooperative association as compensation for services rendered, not to its producer members as payments for their milk. The uniform blended price received by the cooperative members is not increased by the cooperative payments. Such payments only partially compensate the cooperative for the market-wide services it furnishes. Members of a cooperative by reason of the expenditures incurred in connection with its organized efforts and services usually receive less for their milk than is received by the non-cooperative producers. Cooperative payments tend to minimize increases in this disparity. They do not prevent producers, cooperative or non-cooperative, from receiving the statutory uniform blended price.

Prior to, as well as after, the enactment of the 1933 Act, cooperatives furnished various general, marketwide services and arrangements existed whereby non-cooperative producers would be compelled to contribute to the cost of such services. In the earliest licenses and orders issued under the Act, provisions were included for compulsory deductions from the non-cooperative producers' milk checks to compensate for their share in the cost of such services. In a number of instances provisions were made for payments to cooperatives for rendering such services. In 1937 Congress reenacted without change the 1933 Act as amended and thereby adopted the administrative interpretation placed on the Act. At the same time, it ratified and confirmed the interpreting instruments, that is, the licenses and orders. Thereafter, the Secretary continued to issue orders providing for compulsory deductions from non-cooperative producers' milk payments or for payments from the producer settlement fund to cooperatives for market-

wide services. Congress again, in 1948, ratified the milk marketing programs including those that provided for co-operative payments. There is an administrative construction well settled over a period of eighteen years and twice adopted and confirmed by Congress.

Nothing in the Act or in the legislative situation surrounding it "plainly requires" an interpretation contrary to the well settled administrative construction. Quite the contrary, the cooperative payment provisions are authorized—

1. By the "cooperative clause" in Section 10(b)(1) of the Act which requires the Secretary, in the administration of the Act, to accord such recognition to producer-owned and producer-controlled cooperative associations as will tend to promote efficient methods of marketing ~~and~~ distribution.
2. By the "equitable apportionment clause" in Section 8c(5)(B)(d) of the Act which authorizes in milk orders provisions for adjustments that will equitably apportion the total value of milk among producers and associations of producers.
3. By the "incidental and necessary clause" in Section 8c(7)(D) of the Act which authorizes in milk orders terms and conditions that are incidental to and not inconsistent with the use classification, minimum pricing, and equalization or pooling terms of the Act and that are necessary to effectuate the other provisions of an order.

The provision of section 8c(5) which states that an order shall contain certain terms and conditions and "no others", is subject to an exception of provisions falling within the necessary and incidental clause; also the subsection itself contains authority for provisions providing for equitable apportionment of the value of milk. Further, the subsection is to be read in connection with the mandate in the cooperative clause that imposes on the Secretary the duty of promoting efficient methods of marketing through cooperatives.

It is to be presumed that the Congress conferred on the Secretary powers adequate to carry out the duty imposed on him to effectuate the declared policy of Congress. Congress left the Secretary with discretion to fashion, in accordance with "the empiric process of administration," the particular mechanisms necessary to accomplish the task.

In *Stark v. Wickard*, 321 U. S. 288, decided by this Court in 1944, it was held that the respondents had personal claims justifying judicial consideration. Subsequently, facts made of record pursuant to depositions taken in connection with the trial in 1948, raised additional preliminary questions. While the action purports to be a class action, respondents do not adequately represent any class of producers; there is no finding below of adequate representation, and the purported class is so indefinite as not to constitute a "class" within the meaning of Rule 23(a) of the Rules of Civil Procedure.

Further, respondents are not maintaining this suit for adjudication of their personal claims. They are not the real parties in interest within the meaning of Rule 17(a). Handlers whom this Court has held have no standing to complain as to the validity of the cooperative payment provisions, have brought this action under the guise and in the name of the respondents. The action was instigated by the handlers. The respondents have not actively participated in it, have exercised no substantial control over it, have not borne any of the legal fees or expenses (and there is every reason to believe will never bear any of such fees or expenses), and are represented by handlers' attorneys whose fees and expenses have been paid entirely by the handlers.

Finally, respondents are estopped from maintaining this action by reason of the fact that in various referendums under the Act they have not voted against the Order with cooperative payment provisions in it but on the contrary have not voted at all or have voted for the Order. Also some of the respondents were not producers under the Boston Milk Order when the action was begun or later ceased to

be such producers or, in one instance, have joined a cooperative which receives cooperative payments. Respondents are not entitled to have the courts pass on the validity of the cooperative payment provisions of the Order when they have elected to accept and avail themselves of its benefits.

However, petitioner urges that it is imperatively in the public interest that this case be disposed of on its merits and not on the basis of these preliminary questions.

### ARGUMENT.

Depositions taken and made a part of the record (R. 254-466) subsequent to the decision of this Court in *Stark v. Wickard*, 321 U. S. 288, disclose facts showing that this action should be dismissed. The grounds for such dismissal are that the action is not a proper class action, that the surviving plaintiffs (respondents here) are not the real parties in interest, and that they have by their conduct estopped themselves from maintaining this action.

Such questions go to the right of respondents to maintain this action and therefore would normally be discussed *in limine*. However, in petitioner's view it is urgent that the question of statutory construction presented by the case be decided by this Court at this time. The "orderly marketing conditions" for milk contemplated by the basic policy of the Act (§2) cannot be achieved without the marketing control and research services furnished the entire market by producer-owned and producer-controlled co-operative associations. Cooperatives cannot exist as effective marketing agencies and carry the entire burden of the cost of such marketwide services. Congress has stated that the "national public interest" is involved in any disruption of such orderly marketing conditions for milk. (Act, §1). It is imperative to determine whether the Secretary of Agriculture has statutory authority to accord recognition to such co-operatives, as required by section 10(b)(1) of the Act, and by means of the cooperative payments, to provide partial compensation for such services and equalize their burden.

The cooperatives under the Boston Milk Order are continuing to furnish *pendente lite* the general marketing control and research services compensated for by the cooperative payments despite the fact that by reason of the outstanding injunction no such payments are being received. The longer a decision on the merits is delayed under present circumstances, the greater the injury to qualified cooperatives and the greater the possibility of disorderly marketing conditions.

We, therefore, proceed directly to the argument on the merits and leave until later in our brief (pp. 59 to 67) consideration of the preliminary questions mentioned above.

### I. The Sole Question Raised by Respondents is One of Statutory Construction.

A milk order or amendments thereof may be issued by the Secretary of Agriculture only when, after notice and opportunity for hearing, he finds, upon the evidence introduced at the hearing, and sets forth in the order, that the issuance of the order and all the terms and conditions thereof will tend to effectuate the policy declared by Congress in the Act (§8e(3) and (4)). That Congressional policy is—"Through the exercise of the powers conferred on the Secretary of Agriculture under" title I of the Act "to establish and maintain such orderly marketing conditions" for milk as will establish parity prices to farmers for that commodity (§2(1)).<sup>1</sup>

In 1941, 1942 and 1947 hearings were held on the inclusion, retention, and modification of cooperative payment provisions in the Boston Milk Order.<sup>2</sup>

The present provisions for such payments were adopted in 1947 following the 1946 hearings on various cooperative payment proposals (11 F.R. 640, 643-4) and are based on

<sup>1</sup> The parity prices to be established are in case of milk subject to adjustment for certain factors specified in §8e(18).

<sup>2</sup> R. 231-254; 9 F.R. 3059; 12 F.R. 4402 and 4921, 11 F.R. 3607.

the evidence introduced at such hearings and the record thereof (12 F.R. 4921). The Secretary found in both 1941 and 1947 that the Boston Milk Order and all its terms and conditions will tend to effectuate the declared policy of the Act.<sup>1</sup> These findings encompassed the cooperative payment provisions. However, respondents raise no question as to whether these findings of the Secretary are based, as required by the Act, upon the evidence introduced at the hearings.<sup>2</sup> Neither do respondents raise any question as to whether the Secretary's actions were in accordance with the procedural requirements of the Act. *The only question raised by respondents is one of statutory construction, namely, whether the Act authorizes the Secretary to include cooperative payment provisions in the Boston Milk Order.*

## **II. The Administrative Construction of the Act Should Be Followed by the Courts.**

### **A. The administrative construction originated contemporaneously with placing the Act in operation.**

The Act from its start in 1933 was construed by the Secretary as authorizing him to require non-cooperative producers to pay a portion of the cost of general, marketwide services of benefit to all producers, cooperative and non-cooperative. Such services included milk advertising programs, price equalization of excess milk, educational activities, reserves for protection against distributors' failure

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<sup>1</sup> 6 F.R. 3762; 7 C.F.R., 1941 supp., §904.0(a) (6); 12 F.R. 4921, §904.0(a) (1).

<sup>2</sup> The relevant portions of the transcripts of the 1942 and 1947 hearings containing the evidence on which the findings are based, are not even part of the record in this case. Where the hearing evidence is not made of record, the court will assume the existence of evidence sufficient to support the administrative action taken. *Interstate Commerce Commission v. Louisville and Nashville R.R. Co.*, 227 U. S. 88; *United States v. Northern Pacific Ry. Co.*, 288 U. S. 490; *Niagara Hudson Power Co. v. Leventritt*, 340 U. S. 336.

to pay for milk purchased on credit, and other activities of a general, marketwide character. In the licenses first issued under the Act these compulsory payments usually took the form of deductions from the non-cooperative producer's milk check in amounts that matched the deductions that the cooperative producers voluntarily authorized for such services. The principle was one of equalizing the burdens of such services. Later the deductions took the form of payments out of the producer settlement fund and thereby the burden ~~rested~~ proportionately on all producers, cooperative and non-cooperative.

In the earlier licenses and orders the furnishing of such services was often a joint affair. The deductions compulsorily exacted from the non-cooperative producers were paid over to, and expended by, a specially established dairy foundation, council, or board, while the deductions voluntarily authorized by the cooperative producer were paid over to, and expended by, the cooperative. In other instances the cooperative was recognized as best qualified to furnish general, marketwide services and the deductions were paid over to it only. In the later orders payments were made solely to qualified cooperatives and became known as "cooperative payments".

The concept of compulsory deductions from the payments to non-cooperative producers antedated the passage of the 1933 Act. That Act was based on the practices and experience of cooperatives. As the two Congressional committees said, speaking with reference to section 8c(5)—

"These terms follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present section 8(3) of the Agricultural Adjustment Act."

The 1929 sales contract for the Chicago Milk Marketing Area made by the handlers and the Pure Milk Association,

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<sup>1</sup> H. Rept. 1241, 74th Cong., 1st Sess., p. 9; S. Rept. 1011, 74th Cong., 1st sess., p. 9.

a cooperative, exemplifies the methods employed with respect to cooperative payments prior to the 1933 Act. That contract provided for a deduction of 1¢/cwt. on milk of cooperative and non-cooperative producers alike to be paid by the handlers to the cooperative for market services in advertising and promoting the use of milk. The amount was later increased to 2¢ then 3¢ in 1931, and in addition there was a checkoff to the cooperatives to care for its surplus operations and losses.<sup>1</sup>

When the first license was issued under the Act, namely, Chicago Milk Shed License, No. 1, of August 1, 1933, similar provisions were incorporated in it (Art. III, §4). A producer who was not a member of the Pure Milk Association was required to authorize the handler to pay over to Milk Foundation, Inc., a specified amount per cwt. of milk purchased by the handler from the producer. In the event of the failure of any producer to give such authorization, the handler was prohibited from purchasing any milk from him. The deductions were to be used for securing to the non-cooperative producers "advertising, educational, credit loss, and other benefits similar to those which are secured by the members of the Pure Milk Association by virtue of their like payments to said Pure Milk Association." The amount of the deduction from the non-cooperative producer's milk check was the same as that voluntarily authorized by the cooperative producers. The early Boston license had a similar provision.<sup>2</sup>

<sup>1</sup> Sales of Milk in Chicago Area, Report of Federal Trade Commission, H. Doc. 451, 74th Cong., 2d sess., p. 47.

<sup>2</sup> The Greater Boston Market Area Milk License No. 15 (Art. III, §6), issued October 30, 1933, likewise provided for compulsory deductions for general market services. This license was the precursor of Order 4 and its cooperative payment provisions. Distributors were required to deduct from milk payments to non-members of the New England Milk Producers Association specified amounts equal to those that the members had authorized to be deducted and paid over to that cooperative association for advertising, educational, credit loss, and other benefits. The

Other examples of these early licenses providing for compulsory deductions from non-cooperative producers' milk payments for various general, marketwide services are set forth in the footnote below.<sup>1</sup>

The early compulsory deductions were by no means of a stereotyped character. The Twin City License (in addition to a compulsory deduction from the milk checks of all producers to be paid over to a dairy council for its general purposes) provided for a *payment directly to cooperatives* for market balancing operations.<sup>2</sup> Distributors

amounts so deducted from the milk checks of the non-cooperative producers were required to be paid over to a milk director for similar benefits for such producers.

<sup>1</sup> Alameda County, California, Milk Shed License, No. 16, Art. III, §4, issued November 10, 1933.

Baltimore Production Area Milk License, No. 6, Art. III, §5, issued September 29, 1933.

Des Moines Sales Area Milk License, No. 12, Art. II, §3, issued October 24, 1933.

Detroit Milk Shed Milk License, No. 4, Art. III, §4, issued August 23, 1933.

Evansville, Indiana, Milk Shed License, No. 12, Art. III, §4, issued October 19, 1933.

Knoxville, Tennessee, Production Area Milk License, No. 10, Art. II, §4, issued October 24, 1933.

Philadelphia Milk Shed License, No. 3, Art. III, §4, issued August 21, 1933.

Richmond, Virginia, Marketing Area License, No. 25, issued December 20, 1933.

St. Louis Production Area License, No. 18, Art. III, §4, issued November 22, 1933.

Twin City (St. Paul and Minneapolis) Area Milk Licenses, No. 5, Art. III, §3, issued August 29, 1933.

The various milk licenses and orders are public documents on file in the Office of the Hearing Clerk, United States Department of Agriculture.

<sup>2</sup> Twin City (St. Paul and Minneapolis) Area Milk License No. 5, Exh. A, Arts. II and III, issued August 29, 1933 and terminated February 16, 1934; and License No. 32, Exh. A, § II, issued February 16, 1934 and terminated April 18, 1944.

were prohibited from paying non-cooperative producers the flat price fixed by the order and were required to remit to the cooperative, with respect to milk purchased from such non-cooperative producers, the amount of the difference between such flat price and the price paid by the cooperative to its members. The amount so remitted, denominated in the order as a "service charge", was in effect compulsorily deducted from the non-cooperative producers' milk checks. It compensated the cooperative for supplying distributors from day to day with milk to meet the varying deficits in their milk supply from non-cooperative producers. The non-cooperative producers were required to stand a portion of the costs of market balancing and stand-by services furnished by the cooperative for the benefit of the entire market.

The St. Louis Order No. 3 issued January 30, 1936 set up an individual handler equalization pool for both cooperative and non-cooperative producers supplying that handler. The Order required that each handler pay to a qualified cooperative the sum of 4¢/cwt. of milk delivered by the cooperative to the handler. *The payment was compensation "for the services of such association to such handler."*<sup>1</sup>

It was in the light of these various licenses and orders issued by the Secretary during the four years from 1933 to 1937 and providing for compulsory deductions for general, marketwide services or for payments to cooperatives, or both, that Congress enacted the Agricultural Marketing Agreement Act on June 3, 1937. The provisions in the Twin City license and St. Louis order for payments to cooperatives for such services, were still in effect on that date.

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<sup>1</sup>St. Louis, Missouri, Marketing Area, Order No. 3, Art. IX, §5, par. 2, issued January 30, 1936.

**B. The administrative construction has been ratified by Congress.**

Some of these licenses were issued under section 8(3) of the Act as originally passed in 1933 (48 Stat. 31). This section granted the Secretary power to license the handling of milk and other commodities where—

“necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products . . .”

Others of these orders and licenses were either issued, or continued in force, under the Act as amended two years later in August 1935 (49 Stat. 750), subsequent to the decision of this Court in *Schechter Poultry Company v. United States*, 295 U. S. 495. It was stated in the report of the House Committee on Agriculture that these 1935 amendments—

“insofar as they relate to marketing agreements and orders, are primarily intended to implement and spell out in more detail and with greater freedom from ambiguity the powers which were provided for in the original Act.”<sup>1</sup> (Emphasis supplied.)

Because provisions for administrative revocation of licenses were being dropped, the term “order” was substituted for “license”. The license provisions of section 8(3) of the Act thus became the order provisions of section 8c of the Act.

At the same time, the report of the House Committee stated that “it has been found from experience that the participation by . . . associations of producers has been of material value in administering the program”,<sup>2</sup> and in consequence section 10(b) of the Act was amended (49 Stat. 767) to provide that—

<sup>1</sup> H. Rept. 1241, 74th Cong., 1st Sess., p. 7.

<sup>2</sup> H. Rept. 1241, 74th Cong., 1st Sess. p. 13.

"The Secretary, in the administration of this title, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution." (Emphasis supplied.)

Sections 8c and 10(b) of the Act as amended in 1935 have (so far as here relevant) continued in effect without change up to the present time.<sup>1</sup>

Section 1 of the Marketing Agreement Act of 1937 re-enacted without change the provisions of section 8c. The section stated (50 Stat, 246, §1) that—

"The following provisions of the Agricultural Adjustment Act, as amended, not having been intended for the control of production of agricultural commodities, and having been intended to be effective irrespective of the validity of any other provision of that Act are expressly affirmed and validated, and are reenacted without change<sup>2</sup> . . . . . Section 8c . . . ."

Further, in addition to reenacting section 8c, the 1937 Act by the provisions of section 4 "expressly ratified, legalized and confirmed" all marketing agreements, licenses, orders, regulations, provisions, and acts that had been executed, issued, approved, or done under the Agricultural Adjustment Act or any amendment thereof (50

<sup>1</sup> The Constitutional validity of these licensing and order provisions was not decided in *United States v. Butler*, 297 U. S. 1, but the provisions, as amended in 1935, were subsequently held constitutionally valid in *United States v. Rock Royal Co-operative*, 307 U. S. 533, and *H. P. Hood & Sons v. United States*, 307 U. S. 588.

However, those cases did not decide the question here presented—does the Act give the Secretary power to compel non-cooperative producers to contribute toward payments partially to compensate cooperatives for general, marketwide services furnished by them, and thereby tend to equalize the burden of such services?

<sup>2</sup> The statute adds "except as provided in section 2." However, section 2 of the 1937 Act made no changes relevant here.

Stat., 249, §4). Clearly Congress was aware of these licenses and orders.

The House and Senate committees in their reports<sup>1</sup> on the bill set forth the reasons for reenacting the marketing order provisions of the Agricultural Adjustment Act of 1933 as amended and for ratifying and confirming the orders and licenses issued under it. The doubt was as to the "separability" of the marketing order provisions from the production provisions held unconstitutional in *United States v. Butler*, 297 U. S. 1. There was no doubt as to the statutory validity of the licenses and orders,—as to whether their terms and conditions were within the confines of the Secretary's authority as found in the Act. The House committee added<sup>2</sup>—

"Section 4 of the bill negatives any implication that its effect is to invalidate or cast doubt on action heretofore taken under the agreements and orders provisions."

In our case we have an administrative construction of the Act by the Secretary over a period of four years embodied in some dozen or more milk marketing licenses and orders coupled with a reenactment of the Act by Congress without change in the language under which those licenses and orders were either issued or continued in effect by the Secretary. In addition the licenses and orders embodying the administrative interpretation were themselves ratified and confirmed by Congress. Further, as is set forth subsequently in this brief (pp. 29 to 32), the administrative construction has, subsequent to the Congressional ratification, been continued and reiterated by the Secretary up to the present time, has thus become well settled over the period of the last 18 years, and was again confirmed by Congress in 1948.

<sup>1</sup> H. Rept. 468, 75th Cong., 1st Sess., pp. 2, 4; S. Rept. 565, 75th Cong., 1st Sess., pp. 2-3.

<sup>2</sup> H. Rept. 468, 75th Cong., 1st Sess., p. 4.

The administrative interpretation of a statute will be followed by the Courts if it is known to Congress and has been ratified or adopted by Congress. Reenactment of the statute without change constitutes such ratification or adoption.<sup>1</sup> Here, however, we need not rely on mere reenactment as constituting ratification or adoption of the administrative interpretation. Congress has by section 4 of the 1937 Act in terms ratified and confirmed the interpreting instruments themselves, i. e., the licenses and orders.

Congress has thus confirmed the Secretary's construction of the Act as authorizing the incorporation into licenses and orders of provisions for compulsory deductions from payments to non-cooperative producers to equalize the burden of general, marketwide services. If the Act gave that authority at the time of the passage of the 1937 Act on June 3d of that year, then since its language (in all respects here material) has continued unchanged, it still gives that authority. There is no rational basis for any contention that Congress intended to allow provisions for such compulsory deductions in milk marketing orders issued under the Act prior to June 3, 1937 but to forbid provisions for such deductions in orders issued under the same language on or after that date. The same language does not confer two different authorities depending on whether the action is taken before, or on or after, June 3, 1937.

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<sup>1</sup> *United States v. Cerecedo Hermanos y Compania*, 209 U. S. 337, 339; *National Lead Co. v. United States*, 252 U. S. 140, 146-7; *Brewster v. Gage*, 280 U. S. 327, 337; *Cook v. United States*, 288 U. S. 102, 126; *Massachusetts Mutual Life Ins. Co. v. United States*, 288 U. S. 269, 273; *Morrissey v. Commissioner of Internal Revenue*, 296 U. S. 344, 355-6; *Fondren v. Commissioner of Internal Revenue*, 324 U. S. 18, 29; *Wilmette Park District v. Campbell*, 338 U. S. 411, 417-8; *United States v. Zazove*, 334 U. S. 602, 623; *National Labor Relations Bd. v. Gullet Gin Co.*, 340 U. S. 361; *Green Valley Creamery v. United States*, 108 F. 2d 342, 345 (C. A. 1.)

The action in 1940 with respect to the Gillette Bill (§ 3426, 76th Cong., 3d Sess.) indicates the understanding of Congress that the Act authorizes cooperative payment provisions. The bill contained some 16 amendments to the Act, among which was one that would have substituted specific standards for such payments in lieu of the more general existing authority.<sup>1</sup> There was no controversy as to this or other proposed amendments relating to milk (86 Cong. Rec. 12256) but there was great controversy as to certain of the proposed amendments relating to fruits and vegetables for canning. The bill passed the Senate with these canning amendments stricken out (86 Cong. Rec. 12266) but because of inability to agree on the canning amendments the House failed to act on the bill.

The record of the hearings held on the bill by the Committee on Agriculture and Forestry of the Senate in April 1940 discloses that the announced purpose of the cooperative payment amendment was to make plain powers already existing under the Act and not to change the Act except insofar as standards were laid down governing the use of the existing powers. Thus the Senate Committee in its report on the bill said<sup>2</sup>—

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<sup>1</sup> The proposed amendment was to § 5c(5)(C) of the Act and read in part as follows:

“Providing further (i) reasonable compensation (to be paid out of any pool or fund established under this paragraph (C) of subsection (5)), as determined by the Secretary, to bona fide cooperative marketing associations, all of whose operations are under the full control of milk producers, for services rendered to producers of milk or its products covered by the order by performing such marketing functions specified therein as the Secretary determines will tend to effectuate the declared policy of this Act, including but not by way of limitation, handling of surplus milk, or making available to the market sufficient supply of milk at all times; *Provided, however,* That no such compensation shall be paid to any cooperative association which does not comply with the applicable provisions of the order.”

<sup>2</sup> S. Rept. 1719, 76th Cong., 3d Sess., p. 7.

*"This authority is considered as being involved in the power to fix minimum prices to handlers and the manner of making payments to producers already contained in the act. - Hence, the purpose of section 4 is to establish more explicit standards by which the Secretary shall be guided in providing for such compensation. Both types of services are definitely associated with the proper functioning of an order program and the effectuation of the policy of the act."*

(emphasis supplied)

The courts readily recognize that amendments to an existing Act may be intended merely to make plain powers already in existence rather than to change the Act and grant new powers, and under such circumstances the statements of the Congressional committees are given great weight.<sup>2</sup>

Further extracts from the report of the Senate Committee are set forth in Part III of the Appendix to this brief. In addition to the statement that the authority for cooperative payments is already contained in the Act, the Committee distinguishes between general, marketwide services and individual services. The Committee then points out that the general marketwide services benefit all producers with a reasonable degree of equality and that producers who enjoy the benefit of such services should also carry a reasonable and proportionate share of the burden involved.

<sup>1</sup> See also 86 Cong. Rec. 12258-9.

<sup>2</sup> *Jordan v. Roche*, 228 U. S. 436, 446; *Wetmore v. Markoe*, 196 U. S. 68, 77; *Helvering v. New York Trust Co.*, 292 U. S. 455, 469; *Commissioner v. Estate of Holmes*, 326 U. S. 480, 487-8; *Commissioner of Internal Revenue v. Wheeler*, 324 U. S. 542. Cf., *Sioux Tribe of Indians v. United States*, 316 U. S. 317, 329, where the court said that a committee report made five years after the passage of an Act by the committee having jurisdiction over the subject matter is "virtually conclusive as to the significance of that Act."

### C. The administrative construction is well settled.

The Secretary has consistently construed the Act since 1933 not only as authorizing compulsory contributions by non-cooperative producers for general, marketwide services but also as authorizing him to equalize the burden and compensate qualified cooperatives when they perform such services for the benefit of all producers. In confirming the early licenses and orders Congress also confirmed payments to cooperatives as is illustrated by the Twin City license and the St. Louis order (see above, pp. 21 and 22).

The administrative construction has been unchanging since the issuance of the early licenses and orders. It has become settled over the past 18 years. Commencing in 1938 payments to cooperatives for such services have usually taken the form of payment directly out of the producer settlement fund rather than of deductions from producers' milk checks. However, this difference is one of form, not substance—a change in the point of exaction.

The several milk marketing orders that, in addition to the Boston Milk Order, contain such cooperative payment or similar provisions, illustrate the uniform, long continued, well settled character of the administrative interpretation of the Act.

*New York Metropolitan Marketing Area Order:* In 1938 there were included in the New York Order provisions for payments to cooperatives for supplying fluid milk to the market in times of short supply and securing utilization of milk in times of long supply so as to assure the greatest possible returns to all producers (7 C.F.R., 1938 supp., §927.8(e); *United States v. Rock Royal Co-operative*, 307 U.S. 533, 551, footnote 14). The same Order (§927.7(f)) also provided for payments from the producer settlement fund to handlers for services in diversion of milk from shipping to manufacturing plants. These "market service" or "diversion" payments were recognized in *Grandview Dairy v. Jones*, 157 F. (2d) 5 (C.A. 2), cert. denied, 329 U.S. 787.

The cooperative payment provisions of the New York Order are still in effect (7 C.F.R., 1949 ed., §927.9(f)). The market services to be furnished by the cooperative are at present dependent on its having and exercising full authority in the sale of the milk of its members, arranging for and supplying the marketing area in times of short supply with milk for fluid consumption, securing utilization of milk in times of long supply in a manner to insure the greatest possible returns to all producers, and having its entire activities under the control of its members.

*Cincinnati, Ohio, Marketing Area Order:* In 1941 the cooperative payment provisions were placed in the Boston Milk Order here in controversy. This was followed in 1944 by the inclusion of cooperative payment provisions in the Cincinnati Order. The market services furnished by the cooperatives are dependent on its having full authority in the sale of the milk of its members and its maintaining individually or in collaboration with other qualified cooperatives a competent staff for dealing with marketing problems (7 C.F.R., 1949 ed., §965.12).

*Dayton-Springfield, Ohio, Marketing Area Order:* In 1945 an order was issued for the Dayton-Springfield Marketing Area which included cooperative payment provisions similar to those in the Cincinnati Order (7 C.F.R., 1949 ed., §971.11).

Such well settled administrative construction of a statute is entitled to great weight.<sup>1</sup> This is peculiarly true where,

<sup>1</sup> *United States v. American Trucking Associations*, 310 U. S. 534, 549; *Gray v. Powell*, 314 U. S. 402, 412-3; *White v. Winchester Country Club*, 315 U. S. 32, 41; *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U. S. 533, 540-1; *Billings v. Truesdell*, 321 U. S. 542, 552-3; *Boutell v. Walling*, 327 U. S. 463, 470-1; *Fleming v. Mohawk Wrecking and Lumber Co.*, 331 U. S. 111, 116; *National Labor Relations Board v. Denyer Building & Construction Trades Council*, U. S. Sup. Ct., No. 393, Oct. term 1950, decided June 4, 1951; and as to milk orders *Queensboro Farms Products, Inc. v. Wickard*, 137 F. (2d) 969, 980 (C.A. 2).

as here, the interpretation involves "contemporaneous construction of the statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315. It is also peculiarly true where, as here, these men suggested the language and the enactment of sections 8c and 10(b)(1). *Shapiro v. United States*, 335 U.S. 1, 12, footnote 13; *United States v. American Trucking Associations*, 310 U.S. 534, 549.

Further in 1948 Congress again ratified the various milk orders through an amendment (62 Stat. 1258) to section 4 of the 1937 Act. The amendment directed that any program under the 1933 Act as amended, if in effect on January 1, 1950,

"shall continue in effect without the necessity for any amendatory action relative to such program, but any such program shall be continued in operation by the Secretary of Agriculture only to establish and maintain such orderly marketing conditions as will tend to effectuate the declared purpose set out in section 2 or 8c(18)" of the Act.

The reference to section 8c(18) clearly shows that milk programs were among those Congress had in mind.

Under these circumstances, the administrative construction should be sustained unless it gives rise to a serious constitutional question or unless a different construction is plainly required. The construction of the Act to permit cooperative payments gives rise to no serious constitutional question. To the contrary, the constitutional validity of the pooling principle for equalizing benefits or risks has

<sup>1</sup> See Constitutionality of Agricultural Adjustment Act as amended by the Bill, H.R. 8492, etc., prepared by the Solicitor, U.S.D.A., Print of Committee on Agriculture and Forestry, U. S. Senate, 74th Cong., 1st Sess., 1935.

been repeatedly sustained by this Court.<sup>1</sup> Also, the provisions of section 8c of the Agricultural Adjustment Act for the establishment and operation of the producers' settlement fund and price equalization pool have been sustained by this Court in the *United States v. Rock Royal Co-operative*, 307 U. S. 533, 571-3. Finally, the cooperative payment provisions, themselves, have been found "necessary to equitably apportion the total value of milk among producers and associations of producers." (9. F. R. 3059).

### **III. Construction of the Act Contrary to the Well Settled Administrative Construction Is not "Plainly Required" where the Administrative Construction is Based on Broad Powers Vested in the Secretary of Agriculture by the Act.**

The applicable rule of statutory construction has been stated by Chief Justice Taft in *United States v. Jackson*, 280 U. S. 183, 193:

"It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration [citing cases]; and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required [citing cases]."

*United States v. Citizens Loan & Trust Co.*, 316 U. S. 209, 214, and other cases are in accord with this statement of the rule. Petitioner's position is that the Act does not "plainly require" a construction contrary to the well settled administrative construction that has been ratified by Congress for the reason that cooperative payment provisions in a milk marketing order are authorized by the following clauses of the Act:

<sup>1</sup> *Dayton-Goose Creek R. Co. v. United States*, 263 U. S. 456; *New England Divisions Case*, 261 U. S. 184; *Noble State Bank v. Haskell*, 219 U. S. 104; *Mountain Timber Co. v. Washington*, 243 U. S. 219.

- a. The "cooperative" clause, section 10(b)(1), which requires the Secretary, in the administration of the Act, to accord such recognition to producer-owned and producer-controlled cooperative associations as will tend to promote efficient methods of marketing and distribution. The argument on this point is at pages 41 to 43 below.
- b. The "equitable apportionment" clause, section 8c(5) (B)(d), which authorizes in milk orders adjustments that will equitably apportion the total value of milk among producers and associations of producers. The argument on this point is at pages 43 to 46 below.
- c. The "incidental and necessary" clause, section 8c(7) (D), which authorizes in milk orders terms and conditions that are incidental to, and not inconsistent with, the use classification, minimum pricing, and pooling provisions of an Order, and that are necessary to effectuate the other provisions of the Order. The argument on this point is at pages 46 to 55 below.

The authority conferred by these clauses of the Act leave no room for any claim that the Act "plainly requires" a construction contrary to the well settled administrative construction.

Before the relationship of these sources of power to cooperative payment provisions can adequately be considered, it is necessary to ascertain more precisely the services for which the cooperative payment are compensation.

**A. Cooperative payments equalize the burden of general, marketwide services benefiting all producers and are not compensation for individual services to cooperative producers.**

Cooperatives furnish two types of marketing services—  
 (1) *General, marketwide services* benefiting all producers, and

      (2) *Individual services* benefiting the particular producers to whom such services are rendered.

*General, Marketwide Services.*—These may be characterized as marketing control and research services. They include making available reserves of milk to meet the irregular needs of handlers for fluid milk, particularly during the recurrent periods of short supply. Proprietary handlers on the other hand are unlikely to be so altruistic as to maintain reserve supplies for their competitors. When lacking in supplies of fluid milk, they prefer to buy from a cooperative rather than another proprietary handler (R. 23, 69, 83).

These general marketwide services also include affording an outlet for surplus milk not needed for fluid consumption, particularly during periods of over supply. Some proprietary handlers are mere bottlers and avoid handling and manufacturing surplus milk by having no country plants and buying all their supply from a cooperative. Others buy what they need direct from producers but do not handle surplus milk and find a fluid milk outlet for it or manufacture it; or they will manufacture it at times, but not if they have a surplus of manufactured products on hand. (R. 67-8, 82) The cooperative furnishes a standby service directed to keeping the blended price to all producers at the highest practicable level despite the vagaries of supply, demand, and proprietary handlers. The mere existence of a cooperative manufacturing outlet may increase the class price for surplus milk in an order.

These services are costly, yet of utmost value to all producers and are basic to the "orderly marketing conditions" set forth in the Act's declaration of policy. However, these services mean that cooperatives handle a proportionately larger share of surplus milk than proprietary handlers (R. 228, 230) and that the cooperatives' manufacturing operations are inefficient and costly because of the inconstant supply and irregularities due to the standby and market balancing operations of the cooperatives (R. 27). The co-

operatives consequently have higher capital expenditures for plants and higher operating expenses and must incur losses (R. 183-4).<sup>1</sup> The Court of Appeals in its opinion, after defining these marketing control services, stated—

"There is no doubt that these services are pronounced aids to all participants in the marketing area—producers, handlers and consumers. This is so clear that it serves no purpose to describe the helpful effects in detail" (R. 484).

Further, these general, marketwide services of the cooperatives include maintenance of competent staffs of marketing experts to advise on marketing control opera-

<sup>1</sup> The Department of Agriculture has described some of these services under the New York Order as follows:

"Payments for services by cooperatives are to be made to those cooperative associations which have been determined by the Secretary of Agriculture as having their entire activities under the control of their members and as being able to render services to producers as a whole by facilitating the delivery of milk to persons at the point where it may be used in the highest possible class and by making available to handlers in need of milk, an adequate supply. These payments would go to producers' cooperatives which exercise control over milk and route milk into the channels of utilization which net the highest returns to all producers."—Bulletin DM-6, Agricultural Adjustment Administration, U.S.D.A., issued August 1938, pp. 10-11.

In New York Order, the marketing control service function is expressed as follows:

"Having and exercising full control in the sale of the milk of its members, arranging for and supplying in a manner commensurate with the marketing capacity of the several types of cooperative associations, designated in this paragraph, in times of short supply, Class I milk to the marketing areas; securing utilization of milk, in times of long supply, in a manner to assure the greatest possible returns to all producers, having its entire activities under the control of its members."

(7 C.F.R., 1949 ed., § 927.9(f))

tions, to be informed on milk prices, handling costs and differentials, to present evidence at hearings as a basis for constructive amendments of the Order and regulations under it, and to afford the necessary leadership—all of which benefit but are beyond the capacity of the unorganized producer to furnish. Just as the non-cooperative producers are in no position to petition for an order when marketing conditions become chaotic, so they are in no position to petition or carry through on order amendments for changes in prices or in class definitions or other order modifications necessary from time to time for the maintenance of orderly marketing conditions and parity prices.

It is common understanding that the cooperative payments are partial compensation for these general marketing control and research services.<sup>1</sup> Thus, following extensive hearings in 1942 with reference to the cooperative payment provisions of the Boston Milk Order (7 F.R. 11024, 11125), the acting Director of Food Distribution, War Food Administration,<sup>2</sup> stated (9 F.R. 3059)—

"The present plan of payments to cooperatives, which became effective August 1, 1941, was based on the consideration that to achieve the benefits to all producers, which the order is designed to provide two types of activity by producers, cooperative marketing organizations are desirable."

<sup>1</sup> In order to qualify for cooperative payments the cooperative must also be a genuine cooperative in conformity with the Capper-Volstead Act and the state laws and in compliance with Order 4; also it must not fail to furnish its members such individual services as checking weights and tests of milk and guaranteeing payment for members' milk delivered to plants of other handlers. However, these are matters which go to the question of the eligibility of a cooperative to receive some cooperative payment, not to the services compensated for by those payments.

<sup>2</sup> The War Food Administration during the last war took over from the Department of Agriculture for the time being the administration of milk marketing orders.

The acting Director then set forth the services or activities that the cooperatives should perform. They were—

"(1) presentation of evidence at hearings concerning the needs of producers with respect to prices for milk and differentials to reflect handling costs to furnish an adequate basis for constructive amendments to the order, and (2) assumption of responsibility for a reserve of milk to meet the irregular needs of distributors which is essential in a market which provides market-wide equalization among all producers of the total value of the milk."

The expenses incurred by a cooperative in rendering such services are heavy (R. 234-9, 183-4, 68-73). The overhead of manufacturing plants to care for surplus, exclusive of operating charges, is 5¢/ewt. on members milk of one cooperative. (R. 68). The cost to another cooperative for staff, research, preparation of evidence for hearings, shifting milk to a better utilization, and the like is 2.1¢/cwt. (R. 235). One cooperative assesses its members 3¢/cwt. for such services (R. 65).

Were it not for the cooperative payment, the producer who is not a member of a cooperative, would obtain a "free ride." He would reap the benefits of cooperative action without having to bear the burden. The entire cost of general, marketwide services rendered by the cooperative would be borne by the cooperative and consequently by the cooperative producers whose net return would be proportionately less than that of the non-cooperative producers. Taking the cooperative payments from the producer settlement fund is a method of equalizing the burden. It results in all producers, whether cooperative or non-cooperative, sharing equally the cost of general marketwide services. So long as the cooperative payments do not exceed the cost to the cooperative of the general, marketwide services furnished by it, the cooperative producer does not benefit at the expense of the non-cooperative producer. So long as the cooperative payments are less than the cost to the coopera-

tive of the general, marketwide services furnished by it, the non-cooperative producer benefits at the expense of the co-operative producer who has to make up the deficit.

The Court of Appéals stated (R. 485) that it was impracticable for the cooperative to furnish services to the market for the benefit of members without also benefiting other producers; that cooperatives have provided such services for many years, long before regulation of milk marketing by Congress; that there has been no material change since such regulation; and that therefore cooperatives can continue to furnish such services without these payments.

The conclusion does not flow from the premises. With disparity in net return, cooperative membership declines, unit cost of services increases, the cooperative's marketing influence is weakened, and repeatedly the whole cooperative enterprise breaks down.<sup>1</sup> Cooperative producers receive less for their milk than non-cooperative producers because of the expenses of the cooperative in furnishing general, marketwide services benefiting all producers, cooperative and non-cooperative. In the absence of a milk marketing order the disparity in the price received by the cooperative producer takes its place among the irregularities and inequalities in the prices received by various producers from various handlers. Once, however, an order has been issued providing for a uniform blended price to producers, then the disparity in the return to the cooperative producer is emphasized. The cooperative payment minimizes this disparity and prevents the breakdown of the cooperative, thereby assuring those general, marketwide services that are necessary to orderly marketing conditions and to the achievement of the declared policy of the Act. It is for

<sup>1</sup> Nourse, Davis, and Black, *Three Years of the Agricultural Adjustment Administration*, Brookings Institution, 1937, p. 222. The situation is similar in England—*Yearbook on Cooperatives*, 1937, Horace Plunkett Foundation.

these reasons that Congress in section 10(b)(1) of the Act directed that the Secretary—

"shall accord such recognition and encouragement to producer-owned and producer-controlled cooperatives as will . . . tend to promote efficient methods of marketing and distribution."

*Individual Marketing Services.*—These are services that benefit the particular producers receiving them, as for example, testing, sampling, and verification of weights. Such services are designed to protect the individual producer from errors or fraud in accounting for the quantity or quality of milk delivered by him.

The early milk licenses and orders usually provided for compulsory deductions for testing, sampling, verification of weights, or similar individual services. Amounts required to be deducted from the non-cooperative milk producers milk checks for such services were usually paid over to some organization or official, as the market administrator, to supply such services to non-cooperative producers. However, in at least one instance<sup>1</sup> the deductions from the non-cooperative producers checks were required to be paid over to a cooperative association which furnished such services to the non-cooperative producers as well as to its own members. In the 1935 amendments the authority for order provisions requiring compulsory contributions from non-cooperative producers to cover the cost of such individual market services was spelled out in clause (i) of section 8c(5)(E) of the Act. The clause, however, deals only with these individual services, not the basic matters of achieving orderly marketing and parity prices.

Section 8c(5)(E)(i) does not specify who is to furnish the individual market services to the non-cooperative producers. Despite this silence, the section has been con-

<sup>1</sup> Alameda County, California, Milk Shed License, No. 16, Art. III, §4, issued November 10, 1933.

strued by the Secretary as authorizing an order to provide either that these services be furnished by the market administrator or that he contract with cooperatives for furnishing them. Thus, the Chicago, Illinois, Marketing Area Milk Order provides a compulsory deduction in an amount up to 3¢/cwt. from non-cooperative producers' milk checks to be paid over to the market administrator "for verification of weights, samples and tests of milk received from such producers and providing market information to such producers" (7 C.F.R., 1949 ed., §941.10). The Order then continues:

"The market administrator may contract with an association or associations of producers for the furnishing of the whole or any part of such services to, or with respect to, the milk received from such [non-cooperative] producers."

These provisions have been continued in the recent revision of the Chicago Order (16 F.R. 6348, June 30, 1951).<sup>1</sup>

Individual market services play no important part in the

<sup>1</sup> The following orders contain similar provisions: Fall River, Massachusetts, Marketing Area Order (7 C.F.R., 1949 ed., §947.9); Wichita, Kansas, Marketing Area Order (7 C.F.R., 1949 ed., §968.10); Suburban Chicago, Illinois, Area Order (7 C.F.R., 1949 ed., §969.10); Lowell-Lawrence, Massachusetts, Marketing Area Order (7 C.F.R., 1949 ed., § 934.11); Springfield, Massachusetts, Marketing Area Order (7 C.F.R., 1949 ed., §996.10); Worcester, Massachusetts, Marketing Area Order (7 C.F.R., 1949 ed., § 999.10).

At the present time cooperatives are furnishing the verification of weights, sampling and testing services to non-cooperative producers in nine of the milk markets, namely, Memphis, Nashville, Topeka, Toledo, Columbus, Lowell-Lawrence, Tri-State (Ashland, Ky., Huntington and Parkersburg, West Va., Marietta, Ironton and Gallipolis, Ohio), Springfield, and Worcester; also in some instances in the Cincinnati and Dayton-Springfield markets.

In some of these instances cooperatives furnish the services even in the absence of an order provision specifically authorizing contractual arrangements with cooperatives for such services and are compensated therefor by the Market Administrator.

Boston Milk Order. It contains no provision for deductions from non-cooperative producers for individual market services nor for contracting with and compensating cooperatives for furnishing such services to non-cooperative producers, nor does the market administrator furnish any such service directly or through cooperatives. Some producers, cooperative and non-cooperative, in some States, delivering milk for the Greater Boston Marketing Area at some plants are furnished verification of weights, testing and sampling services by the State. However, the cooperatives furnish such services and other individual services to their own members out of the deduction for cooperative dues<sup>1</sup> made solely from the milk checks of its own members (7 C.F.R., 1949 ed., §904.10(e)). The cooperatives receive no payments from the producer settlement fund for any individual market services furnished by them to their members. The non-cooperative producers contribute no part of the cost of any such services to the cooperative producer. In our case there is only the question of payments to cooperatives for general, marketwide services furnished by them and benefiting all producers, cooperative and non-cooperative.

#### **B. The cooperative payment provisions are authorized by the Cooperative clause of the Act.**

At the same time that section 8c of the Act was enacted in 1935, Congress also enacted the following as a part of section 10(b)(1) of the Act (49 Stat. 767; 7 C.F.R. §610 (b)(1)):

"The Secretary, in the administration of this title, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution."

<sup>1</sup>The dues are 3¢/e.wt. in the case of the New England Milk Producers Association.

This cooperative clause not only imposes a duty but also implicitly grants power sufficient to perform that duty. The clause applies "in the administration of this title" and that administration includes the formulation of terms and conditions of milk orders and the issuance of such orders. Since the Secretary's operations with respect to milk under the Act are almost wholly confined to orders, such orders are the only practicable way of carrying out the mandate imposed by section 10(b)(1) of the Act. This cooperative clause is *in pari materia* with the provisions of section 8c(5) of the Act. The two are to be read together and the terms and conditions of a milk order may not be contrary to the mandate imposed on the Secretary by the cooperative clause.

The cooperative clause is a directive, not a grant of discretion. "Shall" is the word used. Recognition and encouragement is required to be accorded producer-owned and producer-controlled cooperatives subject to two limitations only:

\*First, the recognition and encouragement must be in harmony with the policy toward cooperatives set forth in then existing Acts of Congress. This Court has in *United States v. Rock Royal Co-operative*, 307 U. S. 533, 563-64, and *Tigner v. Texas*, 310 U. S. 141, 145-7, referred to the various Acts showing the Congressional policy toward cooperatives, and Congress has declared in the Agricultural Marketing Act of 1929 (46 Stat. 11; 12 U. S. C. §1141(a)(3)) that its policy in meeting the problem of agricultural surpluses is to promote cooperatives so as to provide greater unity in marketing. The cooperative payment provisions are not out of harmony with the policy towards cooperatives set forth in those Acts.

Second, the recognition and encouragement to be accorded cooperatives must be such as will tend to promote efficient methods of marketing and distribution. That the cooperative payment provisions do have this tendency is

clear from the following: The Secretary has found that the cooperative payment provisions will tend to effectuate the declared policy of Congress "to establish and maintain such orderly marketing conditions" as will establish parity prices for farmers (12 F. R. 4921). "Orderly marketing conditions" encompasses "efficient methods of marketing and distribution." Moreover, Congress said that this declared policy of the Act is to be achieved, not merely through the powers conferred on the Secretary by section 8c, but through the powers conferred on him by the Act, among which are the section 10(b)(1) powers. Finally, the House Committee on Agriculture stated<sup>1</sup>

"... it has been found from experience that the participation by local committees and associations of producers has been of material value in administering the program."

The whole purpose of the cooperative clause is to afford the Secretary an opportunity to avail himself of the assistance of cooperatives in achieving orderly marketing conditions for milk and other commodities (mostly perishables). At the same time, the clause imposes a duty on the Secretary to protect cooperatives from the destructive effect of milk orders that afford all producers in a milk shed a uniform price for their milk and at the same time free non-cooperative producers from the burden of the cost of necessary general, marketwide services and rest that cost on cooperative producers. The cooperative payment provisions are within the authority granted the Secretary by the cooperative clause in section 10(b)(1).

#### **C. The cooperative payment provisions are authorized by the Equitable Apportionment clause of the Act.**

The equitable apportionment clause (section 8c(5)(B)(d) of the Act authorizes with respect to the uniform blended

<sup>1</sup> H. Rept. 1241, 74th Cong., 1st Sess., p. 13; S. Rept. 1011, 74th Cong., 1st Sess., p. 26.

price to producers and associations of producers order terms providing—

“(d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.”

The acting Director of Food Distribution, War Food Administration, found (9 F. R. 3059) that the cooperative payment provisions of the Boston Milk Order are—

“necessary to equitably apportion the total value of milk among producers.”

We have shown earlier in our brief that the cooperative payments are compensation for general, marketwide services rendered by the cooperatives, that such services increase the total value of the milk of all producers, *and that the payments equalize or equitably apportion the burden of the costs of such services among producers and cooperatives.*<sup>1</sup> Also, the cooperative payments are an adjustment apportioned on the basis of marketings during a representative period since the adjustment is paid out of the producer settlement fund that is constituted on the basis of marketings and since the period of the actual marketings is a representative period for an adjustment.

Respondents assert that the equitable apportionment clause was intended to authorize only base rating or base and surplus plans in milk marketing orders. The clause as originally enacted in 1935 providing for equitable apportionment on the basis of “*production*” was ample to cover such plans and the Congressional committee contemplated their possibility at the time.<sup>2</sup> However, in the 1937 Act the basis of equitable apportionment was changed from pro-

<sup>1</sup> See also affidavit of H. L. Forrest, R. 14-28.

<sup>2</sup> H. Rept. 1241, 74 Cong., 1st sess., p. 10; S. Rept. 1011, 74th Cong., 1st sess., p. 11.

duction to "marketings." This change in the clause "for the purpose of indicating that the . . . order provisions have no connection with . . . production control"<sup>1</sup> does not leave the clause restricted to base rating and base and surplus plans nor is any such restriction or limited purpose to be found in the legislative history of the clause.

Cooperative payments fall within the scope of the language used by Congress in the equitable apportionment clause. There is no basis for concluding that Congress intended less than it said. In the Dartmouth College case, Chief Justice Marshall stated<sup>2</sup>—

"It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor the American people when it was adopted. It is necessary to go further and say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception."

While the Chief Justice was speaking of a constitutional provision, this Court has held that the same principles govern statutory provisions. In dealing with the Tariff Act of 1930 this Court said—

"But if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators."<sup>3</sup>

<sup>1</sup> H. Rept. 468, 75th Cong., 1st sess., p.3.

<sup>2</sup> *The Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 644-5.

<sup>3</sup> *Barr v. United States*, 324 U. S. 83, 90. See also *Browder v. United States*, 312 U. S. 335, 338-40; *Puerto Rico v. Shell Co.*, 302 U. S. 253, 257-9.

There is nothing in the legislative history of the equitable apportionment clause that indicates any purpose of Congress differing from the literal language of the clause or any purpose to exclude any particular method falling within that language.<sup>1</sup> The clause authorizes the cooperative payment provisions of the Boston Milk Order.<sup>2</sup>

**D. The cooperative payment provisions are authorized by the Incidental and Necessary clause of the Act.**

The incidental and necessary clause, section 8c(7)(D), of the Act authorizes the Secretary to include in a milk marketing order terms and conditions that—

- a. Are "incidental to" the terms and conditions in subsections (5) and (7) of section 8c;
- b. Are "not inconsistent with" the terms and conditions in subsections (5) and (7); and
- c. Are "necessary to effectuate" the other provisions of the Order.

The Secretary found at the time the cooperative provisions were first included in the Boston Milk Order—

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<sup>1</sup> See *Browder v. United States*, 312 U. S. 335, 338.

<sup>2</sup> Article IV of the Boston Milk Order, as originally issued, provided for two sets of minimum prices, one for milk purchased from cooperatives, and the other for milk purchased from producers not members of cooperatives. The minimum price for milk purchased from cooperatives was higher "for the reason that milk purchased from associations of producers has an enhanced value due to the fact that many marketing services have already been performed by such associations." The validity of these two sets of minimum prices recognizing cooperative services was sustained in *Green Valley Creamery v. United States*, 108 F. (2d) 342, 345 (C.A. 1) on the ground that the phrase "market differential" as found in section 8c(5)(A)(1) was sufficiently broad to cover such differentials.

"(c) That the provisions relating to the payments out of the equalization pool to cooperative associations performing certain marketing services are incidental to, not inconsistent with, the other provisions of this order, as amended, and necessary to effectuate the other provisions of the order, as amended; . . . ."

"(f) That the issuance of this order, as amended, and all of its terms and conditions will tend to effectuate the declared policy of the Act." (6 F.R. 3762; 7 C.F.R., 1941 supp., 904.0; R. 150.1).

The Secretary "ratified and affirmed" this finding at the time of the 1947 amendments to the cooperative payment provisions (12 F.R. 4921) and also again in 1948 (13 F.R. 1525, 1639).

Respondents do not deny that the Secretary's finding is based on the evidence introduced at the hearings. On the contrary, respondents attempt to evade the findings by stating<sup>1</sup> that—

"The Secretary's original finding did not describe the qualifying services as 'market-wide services.' He referred to them as 'certain *marketing* services' (R. 151, italics supplied). They are primarily and almost exclusively services by cooperatives to their own members."

The implication in this statement is that the Secretary's findings were made with respect to payments to cooperatives from the equalization pool (producer settlement fund) for individual marketing services, such as verification of weights and other individual services covered by section 8c (5)(E) (*supra*, pp. 39 to 41). Funds for individual services to cooperative members do not come from the equalization pool (producers settlement fund) but from members' dues deducted solely from members' milk payments under the provisions of section 904.10(e) of the Boston Milk Order. Provisions of that sort have been in the Order since its original adoption in 1937. Payments to cooperatives from the equalization pool (producer settlement fund) are for the wholly different general, marketwide services (*supra*, pp.

<sup>1</sup> Respondents Brief on Certiorari, p. 3.

34 to 39). Hearings on the inclusion in the Order of cooperative payment provisions for these services had recently been completed (R. 162-253). The Secretary's finding was made with respect to cooperative payments for such general, marketwide services.

The question is not one of the applicability of the Secretary's finding or its validity on the basis of the evidence introduced. The question is whether the Order provisions which the Secretary has *in fact* found are incidental to and not inconsistent with the other provisions of the Order and are necessary to effectuate such provisions and the declared policy of the Act, are *as a matter of law* just the contrary. This is the statutory construction question in the case and the only question raised by respondents.

#### **1. THE COOPERATIVE PAYMENT PROVISIONS ARE INCIDENTAL TO THE TERMS AND CONDITIONS OF SUBSECTION (5) AND ARE NECESSARY TO EFFECTUATE THE OTHER PROVISIONS OF THE ORDER.**

Respondents claim that as a matter of law and notwithstanding the Secretary's finding, the cooperative payment provisions are not incidental to, and are inconsistent with, the terms and conditions of paragraphs (A), (B), (C) and (E) of subsection (5). Basically subsection (5), paragraphs (A), (B) and (C), authorize Order provisions for use classifications for milk, for *minimum prices* to be paid by all handlers for milk in each use class, and for either a dealer or marketwide equalization pool under which the same price, the *uniform blended price*, is to be received by all producers, irrespective of the particular use made of the particular producer's milk.

The minimum price paid by handlers is subject to adjustments for volume, market, and production differentials, for grade and quality differentials, and for location differentials. The uniform blended price received by producers is subject to the same adjustments and also to a

further adjustment (supra, pp. 43 to 46) equitably to apportion the total value of the milk among producers and co-operatives.

Subsection (5), paragraph (E), authorizes order provisions for marketing information services to non-cooperative producers, for verification of weights, sampling and testing services to non-cooperative producers, and for reserves to maintain the solvency of the equalization pool (producer settlement fund) against handlers' defaults in payments.

Respondents make no claim that the cooperative payment provisions are inconsistent with the terms and conditions of any of the other paragraphs of subsections (5) or (7).

The cooperative payment provisions are incidental to the terms and conditions of subsection (5) and are necessary to their effectuation. The pertinent terms (i.e., use classifications, minimum prices subject to volume, market, production, grade and quality, and location differentials, and equalization on a handler or marketwide basis) do not alone make a practicable milk marketing order or provide an adequate milk marketing program. The specified terms do not meet such marketing conditions as—

- a. Disposition of milk that proprietary handlers will not buy for fluid milk or manufacturing uses. Milk for which the producer can find no market is not classified, priced, and pooled, but dumped.
- b. Utilization of milk in classes that will effect the greatest return to the equalization pool. Classification, pricing, and pooling do not mean that the greatest quantity of milk practicable is sold in the higher priced fluid milk classification.
- c. Reserves for dealers in time of short production. Classification, pricing and pooling do not give a dealer a standby reserve of milk from which he can draw for fluid

uses when his supply from non-cooperative producers falls short.

d. Amendment of an order so as to keep it in line with the established Congressional policy of orderly marketing conditions and parity prices. This must be done through price, classification, and other changes. Classification, pricing and pooling are not principles that adjust themselves automatically without organized research and effort.

These functions are necessary to carrying out the classification, pricing, and pooling terms of the Order and are incidental to those basic terms. These functions are best performed by cooperatives and the cooperative payment provisions are the mechanism for perfecting the pooling and equalization principle so as to include the cost of these incidental and necessary services.

Many provisions of the numerous milk marketing orders are incidental to one or more of the specified terms and conditions in section 8c(5). Among such incidental provisions are determination of pool plant status (7 C. F. R., 1949 ed., §904.4); contracting with cooperatives for verification of weights, sampling, and testing services for non-cooperative producers (*supra*, p. 40); retaining a cash reserve in the producer settlement fund (7 C. F. R., 1949 ed., §904.8(b)); deductions from a producer's settlement fund for payments to handlers for services in diverting milk from shipping to manufacturing plants (see *Grandview Dairy v. Jones*, 157 F. (2d) 5, 6 (C. A. 2), cert. denied 329 U. S. 787); provisions in the nature of a statute of limitations terminating obligations of handlers (7 C. F. R., 1949 ed., §904.9); adjustment of overdue accounts with interest or its equivalent (7 C. F. R., 1949 ed., §904.9(h)); and placing on handlers burden of proof of lower classification and establishing a formula for pricing outside milk (see *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209-225 (E. D. Mo.), affirmed sub. nom. *Bailey Farm Dairy v. Anderson*, 157 F. (2d) 87 (C. A. 8)); *United States v. Ridgeland Creamery*

*Co.*, 47 F. Supp. 145, 149 (W. D. Wis.)). The enumeration could continue at length but it would only serve to reiterate what should be obvious, namely, that the powers under the incidental and necessary clause are essential to an adequate milk marketing order, that those incidental powers cover a wide range, and that they include, among other matters, various types of deductions or payments.<sup>1</sup>

The Secretary of Agriculture in his brief has developed at some length the argument on the facts showing that the general, marketwide services of the cooperatives are necessary to carry into effect the classification, pricing, and pooling provisions and that payments to cooperatives for such services are necessary to effectuate the other provisions of the Order. We adopt the Secretary's argument on this point.

On the question of law, the Court of Appeals stated (R. 484) that "'Necessary' is a harsher requirement than merely beneficial." It is the petitioner's view that the cooperative services meet even this "harsher" test. However, the decisions of this Court would not appear to justify so restrictive a definition as that used by the Court of Appeals:

In *McCulloch v. Maryland*; 4 Wheat. 316, 414, Chief Justice Marshall, referring to the word "necessary" in the "necessary and proper" clause of the Constitution, said that the word does not always import an absolute physical necessity so strong that one thing, to which another may be termed necessary, cannot exist without that other. He then continued—

"Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning

<sup>1</sup> Food Distribution Orders issued under the Second War Powers Act could lawfully, as "an incident" proper to the regulation of the milk industry, include provisions assessing the milk for expenses of the Market Agent's office established pursuant to such Orders. *Varney v. Warehim*, 147 F. (2d) 238, 245 (C.A. 6), cert. denied 325 U.S. 882.

different from that which is obviously intended. It is essential to just construction, that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word 'necessary' is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases . . . This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view . . ."

The Chief Justice concluded that—

"It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end."

This Court has applied similar reasoning in interpreting the word "necessary" where it occurs in a statute. Referring to *McCulloch v. Maryland*, this Court has recently said that "The word 'necessary' . . . has always been recognized as a word to be harmonized with its context." *Armour and Co. v. Wantock*, 323 U. S. 126, 130-1. It does not always mean "indispensable" or "vital" (p. 131). The authority granted the Secretary to include in milk marketing orders incidental and necessary provisions extends to all provisions that are not specifically prohibited and that are plainly adapted to carrying out the expressed terms and conditions.

2. THE COOPERATIVE PAYMENT PROVISIONS ARE NOT INCONSISTENT WITH THE TERMS AND CONDITIONS OF SUBSECTION (5).

Respondents' inconsistency argument is twofold: First, that the cooperative payment provisions prevent payment to producers of the uniform blended price required by the Act. According to respondents the Act requires that the total amount of the minimum prices paid by handlers must equal the total amount of the uniform blended prices received by producers. Second, that the cooperative payment provisions are repugnant to subsection (5)(E)(i).

The Act provides for minimum prices to be paid uniformly by all handlers for milk purchased and for a blended price to be received uniformly by all producers for milk delivered. The Act does not state in section 8e(5)(C) or elsewhere that the aggregate of each must be the same. That conclusion is respondents' gloss.

The Act does not specify the detailed method by which a blended or uniform price is to be computed.<sup>1</sup> The cooperative payment is an expense of the marketing operations deductible before arriving at the net distributable as the blended uniform price. It is a payment to the cooperative for services rendered. It is not a payment for milk delivered. The payment of the uniform blended price to the producer as required by the Act is a payment "for all milk delivered". The cooperative receives no part of this price for its services.

The aggregate of the minimum prices paid by handlers and the aggregate of the uniform blended prices received by producers cannot be the same if reserves are to be maintained in the producer settlement fund (7 C. F. R., 1949 ed., §904.8(b)(7)); if diversion payments are to be made to handlers (see *Grandview Dairy v. Jones*, 157 F. (2d) 5 (C. A. 2)); if a deduction is to be made for seasonality

<sup>1</sup> *Green Valley Creamery v. United States*, 108 F. (2d) 342, 345 (C. A. 1).

payments as in the Louisville Milk Order (7 C. F. R., 1949 ed., §946.7(b)(3)); or if deductions are to be made to avoid double administrative assessments on milk under two orders, as the Lowell-Lawrence and the Boston Milk Orders (7 C. F. R., 1949 ed., §934.9(b)(2)). Also the two aggregates may not be the same by reason of additions to the producer settlement fund over and beyond the handlers' minimum prices. Thus under the Boston Milk Order there are added to the fund certain payments for "outside milk" (7 C. F. R., 1949 ed., §904.9 (g)). The aggregate of the blended uniform prices is more or less than the aggregate of the minimum prices depending on the particular deductions and additions.

As a part of their "inconsistency" argument, respondents take the view that cooperative payments result in cooperative producers being paid a higher price for their milk than the non-cooperative producers. This conclusion is asserted on the theory that the cooperative payments are paid to the cooperative producers and constitute an addition to their uniform blended price. This is an error in which the court below also participated. The Order provides that cooperative payments are made to the cooperative association, not its producer members (7 C. F. R., 1949 ed., §904.10(b)) and the fact has been recognized by this Court.<sup>1</sup> A cooperative and its members are different entities.<sup>2</sup> As has been pointed out the cooperative payment is compensation for services rendered, not a payment for milk delivered. There is no evidence of record that the cooperative payment more than compensates for the general, marketwide services furnished by the cooperative. The evidence is to the contrary. Further, the cooperative producer, for reasons previously stated (supra pp. 37 and

<sup>1</sup> *Stark v. Wickard*, 321 U. S. 288, 305.

<sup>2</sup> *Maryland and Virginia Milk Producers v. District of Columbia*, 129 F. (2d) 787, 792 (C. A. Dist. Col.); *Farmers Union Cooperative v. Commissioner of Internal Revenue*, 90 F. (2d) 488, 491 (C. A. 8).

38), usually receives less for his milk than the non-cooperative producer.

Neither is there any repugnance between clause (i) of subsection (5)(E) and the cooperative payment provisions. Individual services (such as verification of weights, sampling, and testing) for non-cooperative producers are paid by deductions from the milk payments for such producers. The amounts deducted go to whatever agency—market administrator, cooperative, or other—performs the service. The clause does not purport to deal with deductions from the producers settlement fund affecting all producers and made to compensate for services performed by cooperatives for the benefit of all producers.

As to individual services, specific reference is made to the non-cooperative producer in paragraph (E) of subsection (5) which authorizes order provisions for compulsory deductions from non-cooperative producers milk payments for individual services. Such services for the cooperative producer are supplied pursuant to deductions for dues in accordance with the contract between the cooperative and the producer as recognized in paragraph (F) of subsection (5). On the other hand, as to general, marketwide services, separate distinct references are not needed in the Act with respect to either the non-cooperative or the cooperative producer. For such services both pay in the same manner through the cooperative payment from the producer settlement fund. The Cincinnati Milk Order (7 C.F.R., 1949 ed., §§965.12 and 965.11) and the Dayton-Springfield Milk Order (7 C.F.R., 1949 ed., §§971.11 and 971.10) recognize the distinction between the two types of services by providing for payments to the cooperative for general, marketwide services for the benefit of both cooperative and non-cooperative producers and for separate deductions (the one voluntary, the other compulsory), for individual services to cooperative and non-cooperative producers, respectively.

**E. The Act grants the Secretary wide discretion in carrying out the declared policy of Congress.**

The policy of the Act, as applied to milk, is that there be established and maintained such orderly marketing conditions for milk as will in turn establish parity prices for that commodity, adjusted where necessary for the factors set forth in section 8c(18) of the Act. The Congress directed that the Secretary effectuate this vital national purpose "through the exercise of the powers conferred upon" him by the Act (§2). It is to be assumed that such powers are adequate for the task assigned.

The scope of the statutory authority granted the Secretary to carry into effect the declared policy or purposes of the Act is to be determined in accordance with principles this Court has set forth in recent cases dealing with social and economic legislation. The phrasing of such legislation can seldom attain more than approximate precision of definition. Consequently the breadth of phrasing carries with it the task of administrative application. Congress cannot define the whole gamut of remedies to effectuate the particular policy in the great variety of economic situations that prevail among the various milk markets in this country. The adaption of the means to the end is left to the empiric process of administration. The administrative officer has discretion to fashion the mechanisms necessary for attaining the Congressional objectives.<sup>1</sup>

Under the Fair Labor Standards Act minimum wage orders are authorized to "contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." Such authority was held by this Court to

<sup>1</sup> *Phelps-Dodge Corporation v. National Labor Relations Board*, 313 U. S. 177, 185-6, 193-5; *American Power and Light Co. v. Securities and Exchange Commission*, 329 U.S. 90, 105-6. See also *United States v. Dotterweich*, 320 U.S. 277, 280; *Gemco v. Walling*, 324 U.S. 244; *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604.

permit the inclusion in an order of terms prohibiting industrial homework in the embroidery industry, the Administrator having first found that the prohibition was necessary to accomplish the relevant purposes of the order and statute.<sup>1</sup> Where, as here, the finding of such necessity has been made and it is not disputed that the finding is well founded in fact, then in the absence of abuse or a specific prohibition the question of statutory authority is ended.<sup>2</sup> Here there is no claim of abuse and there is no specific prohibition. Respondents rely on the introductory language in subsection (5) of section 8c, stating that a milk order "shall contain one or more of the following terms and conditions and (except as provided in subsection (7)) no others." Congress in that language had in mind the basic features of milk marketing plans, such as use classification, minimum prices, and pooling or equalization.<sup>3</sup> However, Congress at the same time recognized the necessity for incidental provisions in a milk order. Thus the "no others" requirement in subsection (5) is subject to a specific exception reading "except as provided in subsection (7)". That subsection contains the incidental and necessary clause:

If the "no others" provision has the significance given to it by respondents, then not only is the cooperative clause

<sup>1</sup> *Gemsco v. Walling*, 324 U. S. 244, 255.

<sup>2</sup> *Gemsco v. Walling*, 324 U. S. 244, 255.

<sup>3</sup> The New York State Joint Legislative Committee in 1933 made its report in substance that the flat price system had resulted in disorderly marketing conditions and ruinous prices to farmers. It recommended a classified price plan with some form of charge to dealers so that the burden of the surplus would be shared by all. This Court has taken cognizance of these matters in *Nebbia v. New York*, 291 U. S. 500, *Baldwin v. Seelig*, 294 U. S. 511, and *United States v. Rock Royal Co-operative*, 307 U. S. 533. State control laws followed, many of which provided for use classifications, minimum prices, and equalization or pooling arrangements sharing the burden of the surplus, and some also permitted the base surplus plan. It was these principles that Congress had in mind when it enacted subsection (5) and desired to restrict the character of plans under milk orders.

in section 10(b)(1) read out of the Act, but also subsection (11)(C) is read out of the Act. The latter contains a specific provision that all orders—

“shall, so far as practicable, prescribe different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary . . .”

The “no others” provision not only is subject to the exception of the incidental and necessary clause but must be read in conjunction with other provisions of the Act that are sources of authority for order terms.

A milk marketing order is not a mathematical formula but an economic mechanism in the execution of which the Secretary is entitled to something more than the most restrictive interpretation that respondents can conceive. This Court has said that it “is not a tribunal for relief from the crudities and inequities of complicated experimental economic legislation”,<sup>1</sup> and the marketing problems in this industry are said to be “exquisitely complicated.”<sup>2</sup>

In construing the Secretary of Agriculture’s sugar quota allotment powers, this Court pointed out that the problem called for “too specialized understanding to make direct Congressional determination feasible.” Determination under such circumstances becomes an administrative matter. The Secretary—

“could not be left at large and yet could not be rigidly bound. Either extreme would defeat the control system. They could be avoided only by laying down standards of such breadth as inevitably to give the Secretary leeway for his expert judgment. Its exercise presumes a judgment at once comprehensive and conscien-

<sup>1</sup> *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U. S. 604, 618.

<sup>2</sup> *Queensboro Farm Products, Inc. v. Wickard*, 137 F. (2d) 969, (C. A. 2). “The economy of the industry is so eccentric that economic controls have been found at once necessary and difficult.” *Hood and Sons v. DuMond*, 236 U. S. 525, 529.

tions . . . In short, Congress gave the Secretary powers commensurate with the legislative goal."<sup>1</sup>

Congress here gave the Secretary broad and numerous powers commensurate with the legislative goal of orderly marketing conditions and parity prices for milk,—powers of sufficient breadth to enable him to use his expert judgment. There is no reason here to say that that judgment is not comprehensive and conscientious. Respondents only contend that there is a lack of granted power. That contention has no basis when the Act, and its declared policy and objectives and its grants of authority, are viewed as a whole.

#### IV. This Action Should Be Dismissed Since (a) It Is Not a Class Action, (b) Respondents Are Not the Real Parties in Interest, and (c) Respondents Are Estopped.

This action is brought by respondents, both "for themselves and for the benefit of all other persons similarly situated" (R. 2). It purports to be both an individual action and a class action by respondents. Petitioner denies that it is either (R. 141, 93, 52).

In *Stark v. Wickard*, 321 U. S. 288, 305, this Court decided that these respondents "have such a personal claim as justifies judicial consideration". *Stark v. Wickard* was decided in 1944. In that case this Court did not decide that respondents adequately represented any class, nor did the record at that time contain any intimation that the respondents were not the real parties in interest or that they had so acted as to estop themselves from prosecuting this action. The facts relating to these matters were developed in depositions taken and made a part of the record (R. 254-466) subsequently in 1948. In consequence, these matters were not considered by this Court.

This Court may properly consider defenses based on facts arising subsequent to the filing of the complaint. This

<sup>1</sup> *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U. S. 604, §10-11.

Court is governed by the situation as it exists at the time of its decree, not as it appears on the face of the pleadings at the inception of the litigation.<sup>1</sup>

#### A. This action is not a class action.

The complainant does not define the class beyond the words "other persons similarly situated." Whether the class is composed of non-cooperative producers, producers opposed to cooperative payments, producers who voted against the 1941 amendments to Order 4, all producers, or some other group is not stated.

1. *Respondents do not adequately represent any class of producers.* While a judgment in a "spurious" class action under Rule 23(a)(3) of the Rules of Civil Procedure would not bind producers other than respondents,<sup>2</sup> nevertheless the declaratory and injunctive relief here sought (R. 7) would, if granted, affect every producer under the Boston Milk Order. It would affect him, whether or not he was or is a member of a cooperative and whether or not he was or is opposed to, or in favor of, cooperative payments or the 1941 amendments to the Boston Milk Order. It might therefore appear that respondents are asserting that all producers under the Order are intended as the class.

Rule 23 (a) requires that the plaintiff in a class action "fairly insure the adequate representation of all" of the class. Respondents here do not adequately represent the

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<sup>1</sup> *Standard Oil of California v. United States*, 337 U. S. 293; *Randel v. Brown*, 2 Howard 406; *United Corporation v. Federal Trade Commission*, 110 F. (2d) 473, 476 (C. A. 4); *Brooks Brothers v. Brooks Clothing of California*, 60 F. Supp. 442, 456 (D. C., S. D., Calif., aff'd per curiam, 158 F. 2d) 798 (C. A. 9), cert. denied, 331 U. S. 824; *Basevi v. Edward O'Toole Company, Inc.*, 26 Supp. 41 (D. C., S. D., N. Y.); *Civil Aeronautics Board, etc. v. Canadian Colonial Airways, Inc.*, 41 F. Supp. 1006 (D. C., S. D., N. Y.).

<sup>2</sup> *Oppenheimer v. F. J. Young & Bro.*, 144 F. (2d) 327, 390 (C. A. 2); *Albrecht v. Baumer*, 130 F. (2d) 452 (C. A. Dist. Col.) Cf., *Weeks v. Bareco Oil Co.*, 125 F. (2d) 84, 91 (C. A. 7).

class of all producers under the Boston Milk Order. At the time the 1941 amendments to the Order (including the co-operative payment amendments) were adopted, 11,438 producers voted for the amendments, 61 against, with 88 ballots disqualified (R. 91). While there was no separate vote on the cooperative payment amendments, it certainly cannot be concluded that all producers are opposed to the cooperative payment provisions and favor the relief sought by respondents. Obviously a small minority of producers under the Boston Milk Order were of a view that their interests conflicted with those of a large majority of producers. A class action may not be prosecuted where interests of members of the class on whose behalf the action is brought, are in conflict.<sup>1</sup>

The District Court opinion refers to respondents as "producers who are not members of any cooperative association" (R. 144). If the class is to be considered as made up of producers not members of a cooperative, the same conflict of interests exists within the group. Even among those producers 694 voted for and 61 against the amendments with 88 ballots disqualified (R. 91).

2. *There was no finding below of adequate representation.* The courts below did not find that respondents adequately represented any class. A finding of adequate representation of the class is a condition precedent to maintaining a class action. *Pelelas v. Caterpillar Tractor Co.*, 113 F. (2d) 629, 632 (C. A. 7), cert. denied, 311 U. S. 700.

3. *The purported class is too indefinite.* The purported class is too ill-defined and ephemeral in character to constitute a class under Rule 23(a). Many who are "producers" under the Boston Milk Order today may not be producers under that Order tomorrow. Even among the respondents themselves, Walsh was no longer delivering

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<sup>1</sup> *Giordano v. Radio Corporation of America*, 183 F. (2d) 558, 560 (C. A. 3); *Weeks v. Bareco Oil Co.*, 125 F. (2d) 85 (C. A. 7); *Trailmobile Co. v. Whirls*, 154 F. (2d) 866, 871 (C. A. 6), reversed on other grounds, 331 U. S. 40.

under the Order at the time his deposition was taken in 1948 but to a dealer in Glen Falls, New York. He did "intend" to go back to the Hood Company (R. 255). Stark had sold his herd and temporarily gone out of the milk business, but bought cows and resumed shipments later in the year (R. 352-3). Again, if the class is to be considered as made up of producers not members of a cooperative, the composition of any such class varies from time to time. Thus respondent Stebbins in 1943 became a member of a qualified cooperative receiving cooperative payments but took no steps to induce his cooperative to withdraw its application for cooperative payments (R. 281-2). Finally, if the class is to be considered as made up of those producers who voted against the Order amendments of 1941, the class becomes merely the minority of producers in disagreement on some Order provision at that particular moment, and not necessarily the cooperative payment provisions. Some of the class may later reverse themselves by voting for an Order with such provisions in it. Respondents Walsh and Stebbins and presumably Stark already have so voted (R. 257, 292, 353). There is no "class" within the meaning of Rule 23(a). *Giordano v. Radio Corporation of America*, 183 F. (2d) 558, 560-1 (C. A. 3).

If respondents can maintain this suit at all, it must be as individuals for their own benefit and to redress their own personal grievances, not as a class action.

#### **R. Respondents are not the real parties in interest.**

The handlers who have met the cost of this litigation, namely, Hood Company, Whiting Company, White Brothers, Deerfoot Farms, and McAdams (R. 450), have no standing to complain of the validity of the Order provisions for payments to cooperatives, since they have no financial interest in the producer settlement fund. *United States v. Rock Royal Co-operative*, 307 U. S. 533, 560-1, 571-2; *Stark v. Wickard*, 321 U. S. 288, 308. A producer delivering milk

and entitled to a minimum price under the Order does have such standing.<sup>1</sup> *Stark v. Wickard, supra*, 304-6.

The Court of Appeals stated—

"... it is of no moment whether this is properly a class action or not. This is true because the individual plaintiffs have claims justifying judicial consideration," citing *Stark v. Wickard*.

However, the testimony on deposition made a part of this record and taken subsequent to the decision of this Court in *Stark v. Wickard* shows that the four surviving plaintiffs (respondents here) are not prosecuting any such individual, personal claims. They are not the real parties in interest as required by Rule 17(a). They have not brought this action by reason of their justifiable interests in the producer settlement fund but on behalf of the handlers who are defraying the expenses of the litigation and who have no standing to sue. These handlers instigated and are carrying on and financing the suit in the expectation that a favorable decision will result in minimizing the effectiveness of cooperatives in handling surplus milk and supporting the Order. At least one of these proprietary handlers is also a large producer (R. 457-60) but it has not chosen to bring suit or intervene in that capacity.

The handlers instigated the suit. In 1941 respondents Stark, Denton and Stratton, all Whiting Company producers, conferred with Larsen, president of the Whiting Company and with Cooley, its country representative (R. 331-2, 363-7). Cooley told the producers that the

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<sup>1</sup> It should be pointed out to the Court that respondent Stratton is dead (R. 306, 350) and the action can proceed at most only in favor of the surviving parties. Rule 23(a)(2).

Further, the milk deliveries on which respondent Denton bases his claim were made solely in his wife's name and payments for them were made to her (R. 299).

Also, the milk deliveries on which respondent Stark bases his claim were made, not by him, but by D. O. and M. J. Stark (R. 352), 361-2. M. J. Stark is respondent Stark's wife.

Whiting Company was opposed to cooperative payments "and why" (R. 372). At the meeting Whiting representatives—

"... pointed out to them [the producers] that they were the ones affected, and if they wanted to do anything about it, it was up to them, *obviously we could take no formal action.*" (R. 366; italics supplied)

Cooley also said—

"The point is that they wanted assistance and we gave it to them" (R. 370).

Larsen and Cooley retired from the meeting and the three producers decided to bring suit (R. 366). Larsen recommended Mr. Polikoff to act as their attorney and introduced them to him in a Boston hotel room (R. 337-8, 366). There was no understanding with the attorney as to fees or costs (R. 261, 339-40).

Stebbins and Walsh were Hood Company producers. Stebbins was interested in the suit by a letter from Stark (R. 278-9); Walsh at a conference with unnamed producers and a field representative of the Hood Company who brought them together and introduced them (R. 259-61, 265).

When Mr. Polikoff went into the Army, Stark, after conferring with Whiting's representative, Cooley, and some handlers, retained Mr. Hanify of the law firm that represents the Hood Company (R. 347, 400, 433, 447-8).

The handlers have paid the legal fees and expenses. Some Whiting Company producers signed an authorization for that Company to deduct 1c per cwt. from their milk payments to cover expenses of the suit (R. 308). The deductions continued for only two or three months and aggregated between \$400 and \$500 (R. 368). These monies are still held by the Whiting Company and the company has rendered no bills for expenses of the suit (R. 308-9, 348). The Hood Company paid the bills of Mr. Polikoff for his

legal services and disbursements amounting to \$5,112.55. They also paid Mr. Hanify's law firm \$17,751.74 for their legal services and disbursements up to February 2, 1948 (the depositions were taken in December 1948). The Hood Company was reimbursed in part by other handlers, namely, the Whiting Company, White Brothers, Deerfoot Farms and McAdams (R. 450).

Merrill of the Hood Company stated that his company opposed the cooperative payment provisions, was vitally interested in the case, would very much like to see it won, and was contributing to the legal costs (R. 443, 445; see also R. 406). Cooley of the Whiting Company conferred with Geyer of the Hood Company regarding the case (R. 369) and the Whiting Company expected to contribute to the cost of the litigation (R. 368).

The handlers are bringing this suit under the guise and in the names of respondents. The respondents are not the real parties in interest.<sup>1</sup>

The Court of Appeals in its opinion suggested that it would be unsound to bar a person from recourse to a judicial remedy merely because the expenses incurred by him in the litigation are advanced or borne by someone else, and added, "For example, were this the rule, many a matter involving civil rights could not have been brought before the courts in cases in which some organization is championing the rights of some poor person". The analogy is inapposite. Here the handlers are not championing the civil liberties of others, but are instigating in the name of others litigation in their own economic interest under circum-

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<sup>1</sup> Respondents Walsh's deductions for cooperative payments amounted to about 6c a day (R. 267). Estimating on the basis of deliveries, Stebbins' deductions were \$210 for the three years, 1946-1948 (R. 287); and Denton's around \$242 for the eight years, 1941-1948 (R. 326). These amounts hardly justify the conclusion as a practical matter that respondents themselves expect to pay the \$23,000 or so in legal expenses plus further expenses since February 1948.

stances where they have no legal standing to bring suit themselves.

The public interest is asked to be adjudicated in a proceeding in which respondents (plaintiffs below) have not actively participated, over which they have exercised no substantial control, the expenses of which they have not borne, and there is every reason to believe, will not bear, and in which they are represented by the handlers' counsel. The handlers, not respondents, are the true adversaries of the Government in this case. Such a suit should be dismissed. *United States v. Johnson*, 319 U. S. 302.

### **C. Respondents are estopped from maintaining this action.**

The courts should not decide the validity of a provision of an Order at the instance of one who has not voted in opposition to the Order and who has availed himself of the benefits of the Order. No milk order becomes effective unless the Secretary determines (among other things) that it is approved or favored by two-thirds of the producers interested or by interested producers of two-thirds of the volume produced for the market of the specified production area (Act, §8c(9)). Such approval is ascertained by referendum among the producers (Act, §8c(19)). In addition to the referendum of August 4, 1941, held at the time the Boston Milk Order was first amended to include cooperative payment provisions, referendums were held in March and December, 1942, in April and December, 1944, and in 1946 and 1947 (R. 257-8, 292) on an amended Order which included cooperative payment provisions.

The depositions taken and made a part of the record in 1948 subsequent to the decision of this Court in *Stark v. Wickard* show with respect to respondents that—

Walsh apparently did not vote in the August 4, 1941 referendum either for or against the Order with cooperative payment provisions in it (R. 257). He did vote at the March 1942 referendum in favor of the Order with such provisions in it (R. 257).

Stebbins could not remember voting at the August 1941 or March 1942 referendum or that he voted in favor of the Order at the December 1942 referendum (R. 292). At the 1944, 1946 and 1947 referendum he voted through his cooperative (Act, §8c(12)) in favor of the Order with cooperative payment provisions in it (R. 292). Also in 1943 Stebbins joined a cooperative that receives cooperative payments and he did not endeavor to induce the cooperative to withdraw its application for such payments (R. 281-2).

Stark, on being informed that the Referendum Office records showed that he voted at the 1941 referendum in favor of Order with the cooperative payment provisions in it, stated "if the records shows it, I would say it was true" (R. 353).

Denton was uncertain as to his voting (R. 317).

Not one of the surviving respondents testified (nor is there any evidence of record) that he voted against the Boston Milk Order with the cooperative payment provisions in it, either at the time the provisions were first adopted in 1941 just prior to the bringing of this suit or at any subsequent referendum. At all referendums respondents (except possibly Denton) either failed to vote or voted in favor of the Order with the cooperative payment provisions in it. Denton could not recall at what referendums he voted and whether he signed ballots in his own or his wife's name. However, the milk was shipped in his wife's name up to 1945 (R. 299-300) and therefore she, not he, was the producer under the Order at the time this suit was brought.

Respondents are not entitled to have the courts pass on the validity of the cooperative payment provisions of the Order when respondents have elected to accept and avail themselves of the benefits of the Order and its provisions establishing orderly marketing of milk and parity prices for it. *Fahey v. Mallonee*, 332 U. S. 245, 255-6; *Booth Fisheries Co. v. Industrial Commission*, 271 U. S. 208, 210-11; *Yarnell v. Hillsborough Packing Co.*, 70 F. (2d) 435, 438 (C. A. 5); *J. H. Crain v. United States*, 104 Ct. Cls. 713, 738-9.

**CONCLUSION**

For the foregoing reasons it is respectfully submitted that the decision below should be reversed and the complaint dismissed.

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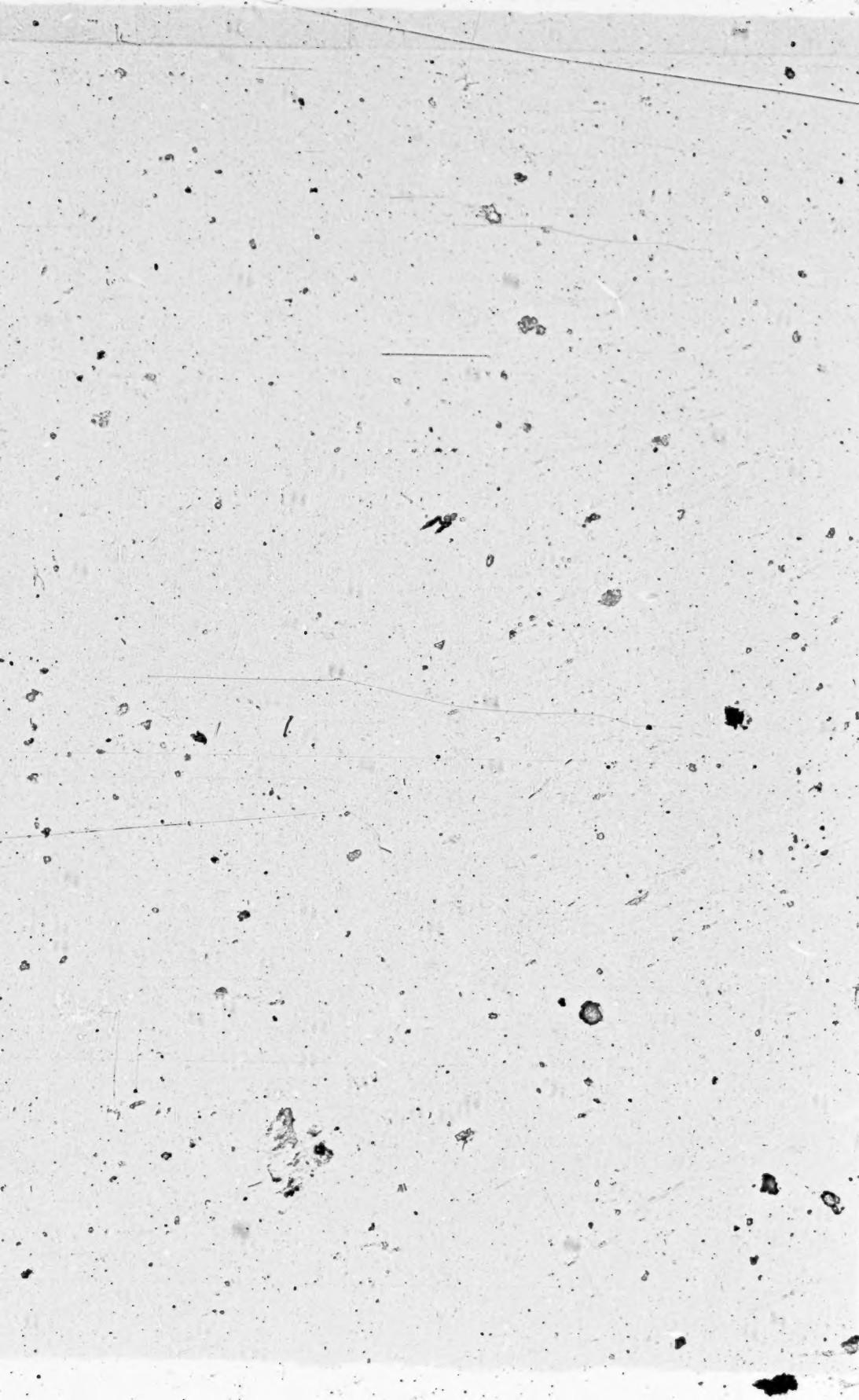
MAURICE A. GELLIS,

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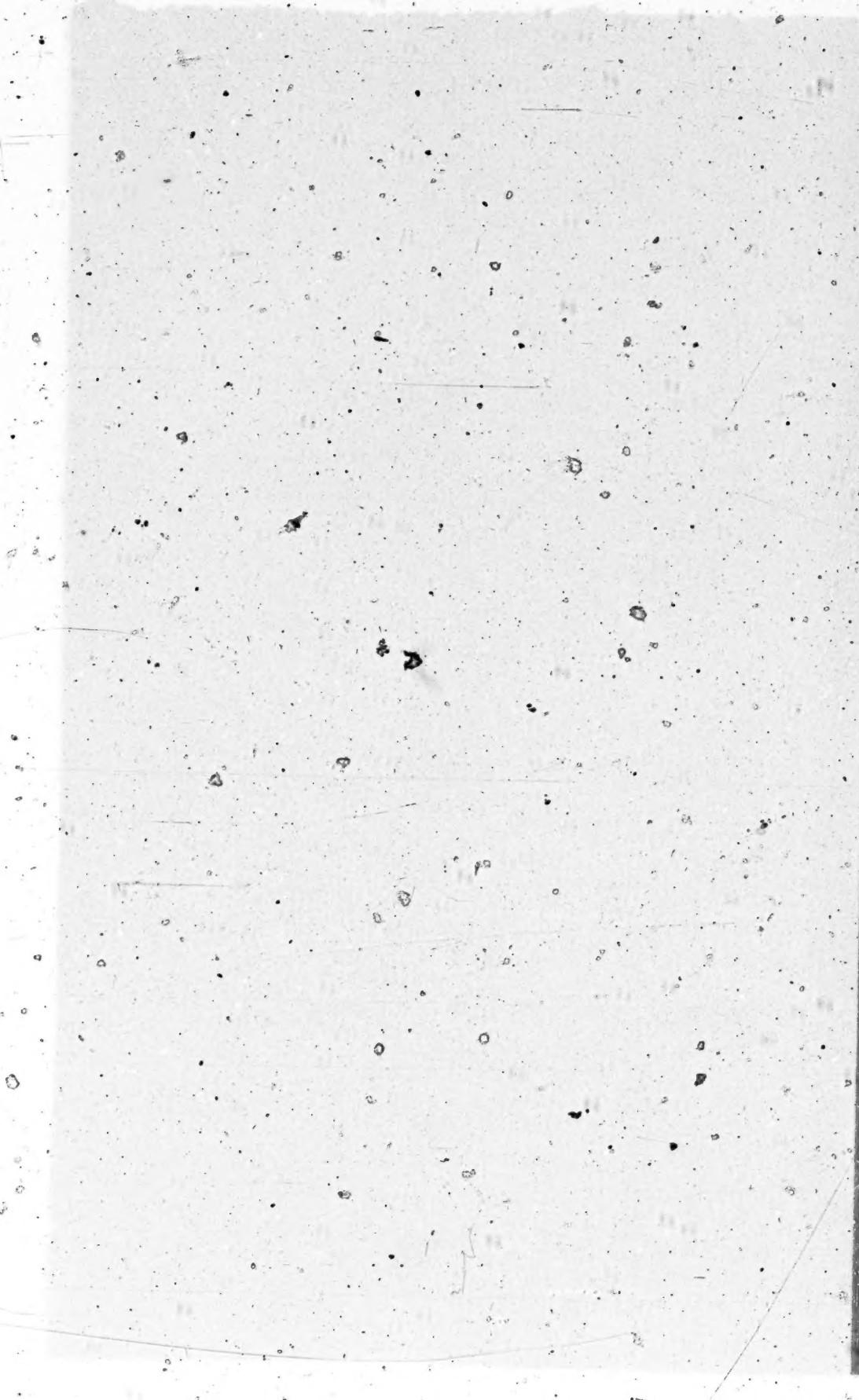
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# **APPENDIX**



## **APPENDIX**

### **Part I—Statutes Involved**

#### **A. Extracts from the Agricultural Adjustment Act.**

approved May 12, 1933 (48 Stat. 31) as amended.

**Note:** There are set forth below portions of sections 1, 2, 8c and 10(b) (1) of the Agricultural Adjustment Act of 1933 (48 Stat. 31) as amended August 24, 1935 (49 Stat. 750), affirmed, validated and reenacted by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), and subsequently amended.

#### **DECLARATION**

It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmer and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

#### **DECLARATION OF POLICY**

Sec. 2. It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish as the prices to farmers parity prices as defined by section 301(a) (1) of the Agricultural Adjustment Act of 1938 \*\*\*

#### **ORDERS**

Sec. 8c(19). The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of pro-

ducers, and others engaged in the handling of any agricultural commodity, or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handler." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

#### COMMODITIES TO WHICH APPLICABLE

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the product thereof (except products of naval stores and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, and Idaho, and not including fruits other than olives, for canning or freezing), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing), soybeans, hops, honey bees and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin):

#### NOTICE AND HEARING

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (3) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

#### FINDING AND ISSUANCE OF ORDER

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds,

and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

#### TERMS—MILK AND ITS PRODUCTS

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

#### (B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provisions is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such

milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustment for (a) volume, market, and production differentials customarily applied by the handlers to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in

such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for issuance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act," engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

#### TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture or a method for the selection, of an agency or agencies and defining their power and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10(g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

**REGIONAL APPLICATION**

(11) • • •

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

**MILK PRICES**

(18) The Secretary of Agriculture, prior to prescribing any term in the marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 2 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the

public interests. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

Sec. 10. • • •

(b)(1) \* \* \* The Secretary, in the administration of this title, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

**B. Extracts from the Agricultural Marketing Agreement Act**, approved June 3, 1937 (50 Stat. 246), as amended by the Agricultural Act of 1948 (62 Stat. 1254).

That the following provisions of the Agricultural Adjustment Act, as amended, not having been intended for the control of the production of agricultural commodities, and having been intended to be effective irrespective of the validity of any other provision of that Act are expressly affirmed and validated, and are reenacted without change except as provided in section 2:

- (a) Section 1 (relating to the declaration of emergency);
- (b) Section 2 (relating to declaration of policy);
- (c) Section 8c (relating to orders);

Sec. 4. (a) Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed,

issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.

(b) Any program in effect under the Agricultural Adjustment Act, as reenacted and amended by this Act, on the effective date of section 302 of the Agricultural Act of 1948<sup>1</sup> shall continue in effect without the necessity for any amendatory action relative to such program, but any such program shall be continued in operation by the Secretary of Agriculture only to establish and maintain such orderly marketing conditions as will tend to effectuate the declared purpose set out in section 2 or 8c(18) of the Agricultural Adjustment Act, as reenacted and amended by this Act.

Sec. 6. This Act may be cited as the "Agricultural Marketing Agreement Act of 1937."

## Part II—Order Involved.

**A. Findings of the Secretary of Agriculture at the time of the adoption of the 1941 amendments to the Boston Milk Order (6 R. R. 3762; 7 C. F. R., 1941 supp., §904.0; R. 150-1).**

**§904.0. Findings.** (a) The Secretary finds, upon the evidence introduced at the hearings, said findings being in addition to the findings made upon the evidence introduced at the original hearings on this order, and on amendments to said order, and being in addition to the other findings and determinations made prior to or at the time of the original issuance of said order, and of amendments thereto (which findings are hereby ratified and affirmed save only

<sup>1</sup> Section 4(b) was added by section 302(e) of the Agricultural Act of 1948. Section 303 of that Act states that title III which includes section 302(e) shall take effect on January 1, 1950.

as such findings are in conflict with the findings hereinafter set forth) :

- (1) That the prices calculated to give milk produced for sale in said marketing area a purchasing power equivalent to the purchasing power of such milk, as determined pursuant to sections 2 and 8(e) of the Agricultural Marketing Agreement Act of 1937, as amended, are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect the market supply and demand for such milk, and that the minimum prices fixed in this order, as amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;
  - (2) That the provisions relating to producer-handlers exempt from the regulation of this part, as amended, only such persons as are producers handling milk of their own production;
  - (3) That the provisions relating to the payments out of the equalization pool to cooperative associations performing certain marketing services are incidental to, not inconsistent with, the other provisions of this part, as amended, and necessary to effectuate the other provisions of the order, as amended;
  - (4) That all the remaining provisions of this part, as amended, are necessary to effectuate the other provisions of the order, as amended;
  - (5) That this part, as amended, regulates the handling of milk in the same manner as a marketing agreement, as amended, upon which hearings have been held; and
  - (6) That the issuance of this part, as amended, and all of its terms and conditions will tend to effectuate the declared policy of the act.
- (b) Such handling of milk in the Greater Boston, Massachusetts, marketing area as is in the current of interstate

commerce or as directly burdens, obstructs, or affects interstate commerce shall, from the effective date hereof, be in compliance with the terms and conditions in this part.

**B. Findings of the acting Director of Food Distribution, War Food Administration, in 1944 at the time of the rejection of the proposals to eliminate the cooperative payment provisions from the Boston Milk Order (9 F. R. 3059).**

In addition to the proposed amendments heard at the hearing held on September 23 and 24, 1943, this report covers two points considered at hearings held September 24, 1942, at Burlington, Vermont, and September 28, 1942, at Boston, Massachusetts, with respect to which no conclusions were drawn in the report covering other proposals considered at that hearing which was issued December 28, 1942. The previous report stated: "On . . . revision of . . . payments to cooperatives . . . and receiving plant handling allowances on both Class I and Class II milk, the record has not yet been completely analyzed. The evidence indicates that these points in the order are interrelated. In the present war emergency, maintenance of an adequate level of milk production and conservation of manpower, gasoline, rubber, and strategic materials needs to be accomplished by improving efficiency in the assembly and transportation of milk to market. Some revision of these points to increase returns to producers should be made as an aid to maintaining production and accomplishments of more efficient use of existing handling and transportation facilities, either through this order itself or in conjunction with other wartime conservation programs that may be developed. In order to avoid undue delay of other needed changes, recommendation of further revision of these points is reserved until after a thorough examination of the evidence has been made."

It is now concluded that no changes concerning these points should be made on the basis of the evidence at the

hearing of September, 1942. That hearing includes testimony designed to show that plant handling allowances should be increased and other testimony designed to show that such allowances should be decreased. With respect to payments to cooperatives from the market-wide pool the proposed change was an elimination of this feature from the order. There is much testimony both for and against such a change.

The present plan of payments to cooperatives, which became effective August 1, 1941, was based on the consideration that to achieve the benefits all producers which the order is designed to provide two types of activity by producers' cooperative marketing organizations are desirable: (1) presentation of evidence at hearings concerning the needs of producers with respect to prices for milk and differentials to reflect handling costs to furnish an adequate basis for constructive amendments to the order, and (2) assumption of responsibility for a reserve of milk to meet the irregular needs of distributors which is essential in a market which provides market-wide equalization among all producers of the total value of the milk. Further, it is recognized that allowances for costs associated with providing services to the market should be separated from the allowance which reflects the additional cost of receiving milk at country plants compared to receiving it directly at city plants. From these considerations it was concluded that provision for payments to cooperative associations is considered necessary to equitably apportion the total value of milk among producers. The testimony in support of the proposal to completely eliminate this feature of the order does not show that these considerations were substantially erroneous.

C. Findings of the Secretary of Agriculture at the time of the adoption of the 1947 amendments to the cooperative payment provisions of the Boston Milk Order (12 F. R. 4921).

§904.0. *Findings and determinations*—(a) *Findings upon the basis of the hearing record.* Pursuant to Public Act No. 10, 73d Congress (May 12, 1933), as amended and as reenacted and amended by the Agricultural Marketing Agreement of 1937, as amended (hereinafter referred to as the "act"), and the rules of practice and procedure covering the formulation of marketing agreements and orders (7 C.F.R., Supps. 900.1 et seq., 11 F. R. 7737, 12 F. R. 1159), public hearings were held upon certain proposed amendments to the tentatively approved marketing agreement and to the order, as amended, regulating the handling of milk in the Greater Boston, Massachusetts, marketing area; and the decision (12 F. R. 4402) was made, with respect to amendments by the Secretary on June 30, 1947. Upon the basis of the evidence introduced at such hearings and the record thereof, it was found that:

- (1) The said order, as amended and as hereby further amended, and all of the terms and conditions of said order, as amended and as hereby further amended, will tend to effectuate the declared policy of the act;
- (2) The prices calculated to give milk produced for sale in said marketing area a purchasing power equivalent to the purchasing power of such milk as determined pursuant to sections 2 and 8 (e) of the act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supplies of and demand for such milk, and the minimum prices specified in the order, as amended and as hereby further amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest, and

(3) The said order, as amended and as hereby further amended, regulates the handling of milk in the same manner as and is applicable only to persons in the respective classes of industrial and commercial activity specified in a marketing agreement upon which hearings have been held.

The foregoing findings are supplementary and in addition to the findings made in connection with the issuance of the aforesaid order and the findings made in connection with the issuance of each of the previously issued amendments thereto; and all of said previous findings are hereby ratified and affirmed except insofar as such findings may be in conflict with the findings set forth herein.

#### **D. Extracts from Boston Milk Order as presently in force.**

§904.8 *Minimum blended prices to producers*—(a) *Computation of value of milk received from producers*. For each month, the market administrator shall compute the value of milk received from producers which is sold, distributed, or used by each pool handler, in the following manner:

(1) Multiply the quantity of milk in each class by the price applicable pursuant to §904.7 (a) and (b);

(2) Add together the resulting value of each class; and

(3) Adjust the value determined in subparagraph (2) of this paragraph as provided in §904.7 (e).

(b) *Computation of the basic blended price*. The market administrator shall compute the basic blended price per hundredweight of milk delivered during each month in the following manner:

(1) Combine into one total the respective values of milk, computed pursuant to paragraph (a) of this section, for each pool handler from whom the market administrator has received at his office, prior to the 11th day after the end of such month, the report for such month and the pay-

ments required pursuant to §904.9 (b) (2) and (g) for milk received during each month since the effective date of the most recent amendment to this subpart:

(2) Add the total amounts of payments required from handlers pursuant to §904.9 (g);

(3) Add the amount of unreserved cash on hand at the close of business on the 10th day after the end of the month from payments made to the market administrator by handlers pursuant to §904.9;

(4) Deduct the amount of the plus differentials, and add the amount of the minus differentials, which are applicable pursuant to §904.9 (e);

(5) Subtract the total amount of cooperative payments required by §904.10 (b);

(6) Divide by the total quantity of milk for which a value is determined pursuant to subparagraph (1) of this paragraph; and

(7) Subtract not less than 4 cents nor more than 5 cents for the purpose of retaining a cash balance in connection with the payments set forth in §904.9. This result, which is the minimum blended price for milk containing 3.7 percent butterfat received from producers at plants located in the 201-210 freight mileage zone, shall be known as the basic blended price.

(c) *Announcement of blended prices.* On the 12th day after the end of each month the market administrator shall mail to all pool handlers and shall publicly announce:

(1) Such of these computations as do not disclose information confidential pursuant to the act;

(2) The zone blended prices per hundredweight resulting from adjustment of the basic blended price by the differentials pursuant to §904.9 (e); and

(3) The names of the pool handlers, designating those whose milk is not included in the computations.

§904.9 *Payments for milk*—(a) *Advance payments*. On or before the 10th day after the end of each month, each pool handler shall make payment to producers for the approximate value of milk received during the first 15 days of such month. In no event shall such advance payment be at a rate less than the Class II price for such month. The provisions of this paragraph shall not apply to any handler who, on or before the 17th day after the end of the month, makes final payment as required by paragraph (b) (1) of this section.

(b) *Final payments*. On or before the 25th day after the end of each month, each pool handler shall make payment for the total value of milk received during such month as required to be computed pursuant to §904.8 (a), as follows:

(1) To each producer at not less than the basic blended price per hundredweight, subject to the differentials provided in paragraphs (d) and (e) of this section, for the quantity of milk delivered by such producer; and

(2) To producers, through the market administrator, by paying to, on or before the 23d day after the end of each month, or receiving from the market administrator, on or before the 25th day after the end of each month, as the case may be, the amount by which the payments required to be made pursuant to subparagraph (1) of this paragraph are less than or exceed the value of milk as required to be computed for such handler pursuant to §904.8 (a), as shown in a statement rendered by the market administrator on or before the 20th day after the end of such month.

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§904.10 *Payment to cooperative associations*—(a) *Application and qualification for cooperative payments*. Any cooperative association of producers duly organized

under the laws of any state may apply to the Secretary for a determination that it is qualified to receive cooperative payments in accordance with the provisions of this section. Upon notice of the filing of such application, the market administrator shall set aside for each month, from the funds provided by handlers' payments to the market administrator pursuant to §904.9, such amount as he estimates is ample to make payment to the applicant, and hold it in reserve until the Secretary has ruled upon the application. The applicant association shall be considered to be a qualified association entitled to receive such payments from the date fixed by the Secretary, if he determines that it meets all of the following requirements:

- (1) It conforms to the requirements relating to character of organization, dividend payments, and dealing in products of nonmembers, which are set forth in the Capper-Volstead Act and in the state laws under which the association is organized.
- (2) It operates as a responsible producer-controlled marketing association exercising full authority in the sale of the milk of its members.
- (3) It systematically checks the weights and tests of milk which its members deliver to plants not operated by the association.
- (4) It guarantees payment to its members for milk delivered to plants not operated by the association.
- (5) It maintains, either individually or together with other qualified associations, a competent staff for dealing with marketing problems and for providing information to its members.
- (6) It constantly maintains close working relationships with its members.
- (7) It collaborates with similar associations in activities incident to the maintenance and strengthening of collective

bargaining by producers and the operation of a plan of uniform pricing of milk to handlers.

(8) It is in compliance with all applicable provisions of this subpart.

(b) *Cooperative payments.* On or before the 25th day after the end of each month, each qualified association shall be entitled to receive a cooperative payment from the funds provided by handlers' payments to the marketing administrator pursuant to §904.9. The payment shall be made under the conditions and at the rates specified in this paragraph, and shall be subject to verification of the receipts and other items upon which such payment is based.

(1) Each qualified association shall be entitled to payment at the rate of 1 cent per hundredweight on the milk which its producer members deliver to the plant of a handler other than a qualified association; except on milk delivered by a producer who is also a member of another qualified association, and on milk delivered to a handler who fails to make applicable payments pursuant to §904.9 (b) (2) and §904.11 within 10 days after the end of the month in which he is required to do so. If the handler is required by paragraph (e) of this section to make deductions from members of the association at a rate lower than 1 cent per hundredweight, the payment pursuant to this subparagraph shall be at such lower rate.

(2) Each qualified association shall be entitled to payment at the rate of 2 cents per hundredweight on milk received from producers at a plant operated by that association.

(c) *Reports relating to cooperative payments.* Each qualified association shall, upon request by the market administrator, make reports to him with respect to its use of cooperative payments and its performance in meeting the requirements set forth as the basis for such payments, and shall file with him a copy of its balance sheet and operating statement at the close of each fiscal year.

(d) *Suspension of cooperative payments.* Whenever there is reason to believe that an association is no longer meeting the qualification requirements, the market administrator shall, upon request by the Secretary, suspend cooperative payments to it, and shall give the association written notice of the suspension. Such suspended payments shall be held in reserve until the Secretary has, after notice and opportunity for a hearing, ruled upon the performance of the association.

(e) *Deductions from payments to members.* (1) Each association which is entitled to receive cooperative payments on milk which its producer members deliver to a handler other than a qualified association may file a claim with the handler for amounts to be deducted from the handler's payments to such members. The claim shall contain a list of the producers, an agreement to indemnify the handler in the making of the deductions, and a certification that the association has an unterminated membership contract with each producer, authorizing the claimed deduction.

(2) In making payments to his producers for milk received during the month, each handler shall make deductions in accordance with the association's claim, and shall pay the amount deducted to the association within 25 days after the end of the month.

§904.11 *Payments of administration expenses.* Within 23 days after the end of each month, each handler shall make payment to the market administrator of his pro rata share of the expense of administration of this subpart. The payment shall be at the rate of 3 cents per hundred-weight, or such lesser amount as the Secretary may from time to time prescribe, and shall apply to all of the handler's receipts of milk from producers and receipts of outside milk during the month.

**Part III—Extract from Report on Gillette Bill.**

— (S. Rept. No. 1719, 76th Cong. 3d Sess.)

Section 4 of the amending bill amends section 8c(5)(C) of the act by providing specifically for the segregation, from the total value of milk as fixed by the order, of sums to provide reasonable compensation for two distinct kinds of marketing services as indicated in the provisions designated as (i) and (ii). This authority is considered as being involved in the power to fix minimum prices to handlers and the manner of making payments to producers already contained in the act. Hence, the purpose of section 4 is to establish more explicit standards by which the Secretary shall be guided in providing for such compensation. Both types of services are definitely associated with the proper functioning of an order program and the effectuation of the policy of the act.

The services for which compensation is authorized by the provision designated by (i) are of the type regarded as essential in carrying out the method of payment to producers authorized by paragraphs (B) (ii) and (C) of subsection (5) of section 8c under the method of pricing milk to handlers provided in paragraph (A) of the same sub-section. Authorization of such compensation to be paid out of any pool or fund established under paragraph (C) of subsection (5) involves the fundamental principle that such services be those which are identifiable as benefiting all producers with a reasonable degree of equality as distinguished from services, the benefits of which are limited primarily to members of a particular cooperative association. Illustrations of these types of marketing services are suggested in the amendment itself, but the Secretary is authorized to specify others which may conform to these general principles when necessary to achieve the same marketing results under circumstances peculiar to different markets. Because of the nature of such services,

compensation with respect thereto is limited to bona fide cooperative marketing associations, all of whose operations are under the full control of milk producers.

The services for which compensation is authorized by the provision designated by (ii) are in addition to and in no way a duplication of the services for which compensation is authorized under (i). The payments authorized by (ii) are similar to location differentials now authorized, having to do with the movement and handling of milk, and are available to any plant operator, irrespective of whether or not such operator is also a cooperative association. This type of allowance is designed to cover costs involved in the movement of milk from or to processing plants when marketing conditions are such as to necessitate such movement in order to maximize returns to all producers.

Eligibility of an association or operator to receive payments authorized by (i) and (ii) from a pool or fund as established by an order is further conditioned upon compliance with the applicable provisions of the order. These two provisions supplement each other and together provide a way whereby all producers who enjoy the benefits of such marketing services also carry a reasonable and proportionate share of the burden involved.